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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE and AMERICAN CIVIL RIGHTS FOUNDATION,
Petitioners,
v.
COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRANT RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), et al.,
Plaintiffs and Respondents.
and
JENNIFER GRANHOLM, et al.,
Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the drafters and sponsors of Michigan's Proposal 2, a successful popular initiative amending the Michigan Constitution to prohibit discrimination by the state on the basis of race or sex, have a right under Federal Rule of Civil Procedure, Rule 24(a) to intervene in federal court in post-election litigation challenging the constitutionality of that initiative.

2. Whether elected officials who vigorously opposed Proposal 2 may be deemed to adequately represent the interests of the initiative's drafters and sponsors, for purposes of denying those drafters and sponsors intervention as of right under Rule 24(a) to defend the constitutionality of Proposal 2.

PARTIES TO THE PROCEEDINGS

Petitioner Michigan Civil Rights Initiative Committee is the registered Ballot Question Committee formed by the drafters, sponsors, and supporters of Article I, Section 26, of the Michigan Constitution (Proposal 2). Petitioner was an appellant below.

Petitioner American Civil Rights Foundation is a California nonprofit public interest corporation with members in Michigan. Petitioner was an appellant below.

The Respondents in this Court are: Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), United for Equality and Affirmative Action Legal Defense Fund, Rainbow Push Coalition, Calvin Jevon Cochran, Lashelle Benjamin, Beautie Mitchell, Deneshea Richey, Stasia Brown, Michael Gibson, Christopher Sutton, Laquay Johnson, Turquoise Wise-King, Brandon Flannigan, Josie Hyman, Issamar Camacho, Kahleif Henry, Shanae Tatum, Maricruz Lopez, Alejandra Cruz, Adarene Hoag, Candice Young, Tristan Taylor, Williams Frazier, Jerell Erves, Matthew Griffith, Lacrissa Beverly, D'Shawn Featherstone, Danielle Nelson, Julius Carter, Kevin Smith, Kyle Smith, Paris Butler, Touissant King, Aiana Scott, Allen Vonou, Randiah Green, Brittany Jones, Courtney Drake, Dante Dixon, Joseph Henry Reed, AFSCME Local 207, AFSCME Local 214, AFSCME Local 312, AFSCME Local 836, AFSCME Local 1642, AFSCME Local 2920, and the Defend Affirmation Action Party. They were plaintiff/appellees below.

The Respondents in this Court are: Chase Cantrell, Melinda Nestor, Chidimma Uche, Joshua Kay, Sheldon Johnson, Matthew Countryman, Bryon Maxey, Rachel Quinn, Kevin Gaines, Dana Christensen, Toniesha Jones, Seger Weisberg, Jay Robinson, Casey R. Kasper, Sergio Eduardo Munoz, Rosario Ceballo, Kathleen Canning, and Mark C. Carter II. They were plaintiff/appellees below.

Other Respondents in this Court are: Regents of the University of Michigan, Board of Trustees of Michigan State University, Board of Governors of Wayne State University, Mary Sue Coleman, in her official capacity as President of the University of Michigan, Lou Anna K. Simon, in her official capacity as President of Michigan State University, and Irvin D. Reid, in his official capacity as President of Wayne State University. They were defendant/appellees below.

The Respondents in this case are: Michael Cox, in his Official Capacity as Attorney General of the State of Michigan and Eric Russell. They were defendant-intervenors below.

Governor Jennifer Granholm, in her Official Capacity as Governor of the State of Michigan, was a named a defendant below. She was dismissed from the consolidated actions below on August 15, 2007, and September 6, 2007.

CORPORATE DISCLOSURE STATEMENT

Petitioner Michigan Civil Rights Initiative Committee is the registered Ballot Question Committee formed by the drafters, sponsors, and supporters of Article I, Section 26, of the Michigan

Constitution (Proposal 2). It has no parent company, and no publicly held companies hold any stock of the Petitioner.

Petitioner American Civil Rights Foundation is a California nonprofit public interest corporation with members in Michigan. It has no parent company, and no publicly held companies hold any stock of the Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES viii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

A. The People of Michigan Overwhelmingly Vote to End Official Discrimination by Enacting Proposal 2 2

B. The Legality of Proposal 2 Is Immediately Challenged in Federal Court, with Ideological Opponents of the Measure Named as Both Plaintiffs and Defendants 5

C. The District Court Denies Petitioners' Motion to Intervene 7

D. A Sharply Divided Sixth Circuit Panel Affirmed the District Court Holding That the Drafters and Sponsors of Proposal 2 Lacked a Substantial Legal Interest to Defend its Constitutionality in a Post-Election Challenge 8

TABLE OF CONTENTS—Continued

Page

REASONS FOR GRANTING THE WRIT 10

INTRODUCTION 10

I. THERE IS A DIRECT CONFLICT BETWEEN THE SIXTH AND NINTH CIRCUITS ON WHETHER THE SPONSORS OF CITIZEN INITIATIVES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(a) 12

II. CONTRARY TO THE MAJORITY BELOW, ELECTED OFFICIALS CAN NOT BE PRESUMED TO ADEQUATELY REPRESENT THE INTERESTS OF THE SPONSORS OF PROPOSAL 2 FOR PURPOSES OF DENYING INTERVENTION UNDER RULE 24(a) 17

A. Both the Majority and Dissent Below Recognized That the Substantiality of Petitioners' Legal Interest in This Litigation Is Closely Tied Up With Whether Michigan's Elected Officials Can Adequately Represent and Protect That Interest ... 18

TABLE OF CONTENTS—Continued

Page

B. Popularly Enacted Initiatives Are Distinct from Laws Adopted Through the Legislative Process and When Such Citizen-Adopted Laws Are Challenged in Court, Elected Officials Cannot Be Presumed to Adequately Represent the Interests of the Drafters and Sponsors of Those Laws 19

C. Since Michigan's Elected Officials Cannot Adequately Represent Petitioners' Interest in Upholding the Constitutionality of Proposal 2, Petitioners Have a Substantial Legal Interest in Participating in the Defense of the Measure They Sponsored, and Should Be Granted Intervention as of Right 22

III. IF ALLOWED TO STAND, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON THE EXERCISE OF POLITICAL EXPRESSION VIA THE INITIATIVE PROCESS 25

CONCLUSION 29

TABLE OF CONTENTS—Continued

Page

APPENDIX A - Corrected first page of (with letter from Deputy Clerk) and original Opinion of the U.S. Court of Appeals for the Sixth Circuit in *Coalition to Defend Affirmative Action v. Granholm*, Nos. 06-2653/2656 filed September 6, 2007

APPENDIX B - Opinion and Order Granting Motions to Expedite, Granting in Part and Denying in Part Motions to Intervene, and Striking Motion to Dismiss in *Coalition to Defend Affirmative Action v. Granholm*, Case No. 06-15024 filed December 27, 2006 in the U.S. District Court, Eastern District of Michigan, Southern Division

APPENDIX C - Order Denying the Petition for Rehearing en banc in *Coalition to Defend Affirmative Action v. Granholm*, Nos. 06-2653/2656 filed December 17, 2007 in U.S. Court of Appeals for the Sixth Circuit

APPENDIX D - Text of Federal Rules of Civil Procedure, Rule 24, from Westlaw

APPENDIX E - Text of Michigan Constitution, Article I, Section 26, from Westlaw

TABLE OF AUTHORITIES

Page

Cases

Coal. to Defend Affirmative Action & Integration & Fight for Equality By Any Means Necessary (BAMN) v. Bd. of State Canvassers, 686 N.W.2d 287 (Mich. Ct. App. 2004) 4

Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006) 9, 24

Coal. to Defend Affirmative Action v. Granholm, 501 F.3d 775 (6th Cir. 2007) 1

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Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489 (9th Cir. 1995) 28

Gratz v. Bollinger, 539 U.S. 244 (2003) 3

Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999) 14

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Idaho v. Freeman, 625 F.2d 886 (9th Cir. 1980) 15, 17

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TABLE OF AUTHORITIES—Continued

Page

Michigan Civil Rights Initiative v. Bd. of State Canvassers, 708 N.W.2d 139 (Mich. Ct. App. 2005) 4

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Sagebrush Rebellion, Inc. v. Watt, 713 F.2d 525 (9th Cir. 1983) 15-17, 21

Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972) 22

United States v. Stringfellow, 783 F.2d 821 (1986) 28

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TABLE OF AUTHORITIES—Continued

Page

United States Constitution

U.S. Const. amend. I 5

U.S. Const. amend. XIV 5

Michigan Constitution

Mich. Const. art. I, § 26 ..... 2-3, 6, 9, 24

Federal Statute

28 U.S.C. § 1254(1) 1

Rules of Court

Fed. R. Civ. P. 12(b)(6) 6

Fed. R. Civ. P. 24 ..... 6, 14

Fed. R. Civ. P. 24(a) ..... passim

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TABLE OF AUTHORITIES—Continued

Page

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PETITION FOR WRIT OF CERTIORARI

Petitioners Michigan Civil Rights Initiative Committee and American Civil Rights Foundation respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The initial opinion denying Petitioners' motion to intervene under Federal Rule of Civil Procedure, Rule 24(a) is reported at 240 F.R.D. 368 (E.D. Mich. 2006) and reproduced in the Appendix (App.) at B. The decision of the court of appeals affirming denial of intervention is reported at 501 F.3d 775 (6th Cir. 2007), and is reproduced in the Appendix at A. Rehearing and rehearing en banc denied December 17, 2007, is reproduced in the Appendix at C.

JURISDICTION

The Sixth Circuit denied rehearing and rehearing en banc on December 17, 2007. App. C. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 209 (1965) ("In view of our decision herein, we think that section 1254(1) permits us to review the orders denying intervention.").

STATUTORY PROVISION INVOLVED

Federal Rules of Civil Procedure, Rule 24(a) provides:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> > (1) is given an unconditional right to intervene by a federal statute; or
> >
> > (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

STATEMENT OF THE CASE

A. The People of Michigan Overwhelmingly Vote to End Official Discrimination by Enacting Proposal 2

On November 7, 2006, the voters of Michigan reaffirmed their commitment to the principles of racial equality and nondiscrimination by adopting the Michigan Civil Rights Initiative, by 57.9% of the vote. App. A-8. This measure, which adds Article I, Section 26, to the Michigan Constitution, prohibits the State of Michigan and its political subdivisions, including universities, colleges, and school districts, from discriminating against or granting preferential

treatment to any individual or group on the basis of race, sex, ethnicity, color, or national origin in public contracting, public education, and public employment. The initiative appeared on the ballot as Proposal 06-2, commonly referred to as Proposal 2 (Proposal 2 or Section 26). The full text of Article I, Section 26, is set out at App. E. The measure became effective on December 23, 2006.

Proposal 2 was drafted and sponsored by Petitioners, the Michigan Civil Rights Initiative Committee (MCRIC) and the American Civil Rights Foundation (ACRF). Proposal 2 was the voters of Michigan's response to this Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003), and *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003), which allowed the University of Michigan to grant preferences to African American, Hispanic, and Native American applicants in its admissions decisions.

Petitioners MCRIC and ACRF were at the forefront of the protracted campaign to adopt Proposal 2. The Sixth Circuit decision describes their significant interest in this lawsuit, in part, as follows:

> The MCRI[C], headed by Jennifer Gratz, the lead plaintiff in *Gratz v. Bollinger*, 539 U.S. 244 [] (2003), is registered with the Michigan Secretary of State as the official ballot-question committee for Proposal 2 . . . . The ACRF is a public-interest corporation dedicated to eradicating sex and race preferences throughout the United States . . . . The MCRI[C] and ACRF worked together, expending labor and funds, to see that Proposal 2 found its way on Michigan's November 2006 general election ballot and to

> see that the Michigan voters approved Proposal 2. The district court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts."

App. A-14.

Proposal 2 was highly controversial and efforts to get it onto the ballot involved three pre-ballot lawsuits in state and federal courts. In *Coal. to Defend Affirmative Action & Integration & Fight for Equality By Any Means Necessary (BAMN) v. Bd. of State Canvassers*, 686 N.W.2d 287 (Mich. Ct. App. 2004), BAMN challenged the Board of State Canvassers' approval of the form of the petition. In *Michigan Civil Rights Initiative v. Bd. of State Canvassers*, 708 N.W.2d 139 (Mich. Ct. App. 2005), MCRIC challenged the Board of State Canvassers' failure to certify the initiative petitions for placement on the November, 2006, ballot. In *Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007), Ward Connerly and Jennifer Gratz, members of ACRF and MCRIC, among others, were named defendants in a challenge to the placement of Proposal 2 on the general election ballot. Many of the same plaintiffs in these pre-ballot lawsuits are plaintiffs in the case at bar's post-ballot challenge to Proposal 2 on constitutional grounds. As noted by the Sixth Circuit, MCRIC and ACRF were "instrumental in Proposal 2's path to the ballot and ultimate approval." App. A-18.

B. The Legality of Proposal 2 Is Immediately Challenged in Federal Court, with Ideological Opponents of the Measure Named as Both Plaintiffs and Defendants

The day after the election, the constitutionality of Proposal 2 was challenged in federal court by many of the same plaintiffs, including BAMN, who were involved in the pre-ballot litigation. The lawsuit named as defendants (many of whom are the same elected officials who opposed Proposal 2) including: Jennifer Granholm, the Governor of Michigan; Regents of the University of Michigan; the Board of Trustees of Michigan State University; and the Board of Governors of Wayne State University.[1] The lawsuit seeks declaratory judgment that Proposal 2 is unconstitutional under the First and Fourteenth Amendments, in violation of Titles VI, VII, and IX of the Civil Rights Act of 1964, and Executive Order 11246, and for a preliminary and permanent injunction against its enforcement.

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[1] On November 8, 2006, Mary Sue Coleman, the President of the University of Michigan, gave a public address vowing to "do whatever it takes" to maintain the same number of underrepresented racial minorities at the university that were admitted when they were allowed to consider race directly in admission decisions. *See, e.g.*, Steve Chapman, *University of Michigan v. the People*, Chicago Tribune, Nov. 23, 2006, at 19 ("Her message was that the school would do 'whatever it takes' to delay, frustrate and circumvent the clearly expressed will of the public."). Governor Granholm opposed Proposal 2 during the campaign. App. B-17; *see also*, http://www.michigan.gov/som/0,1607,7-192-155904-,00.html (last visited Mar. 5, 2008) ("I am sad and disappointed voters said yes to Proposal 2.").

On December 11, 2006, the University Defendants filed a cross claim against Governor Granholm seeking a preliminary injunction permitting them to continue using existing admissions and financial aid through the end of their current cycle and filed a motion for preliminary injunction.[2] App. B-4. That same day, Governor Granholm formally requested the Attorney General to provide her with legal representation in the lawsuit. *Id.* The Attorney General created a conflict wall recognizing a potential legal conflict because of differing political positions taken on Proposal 2 during the preelection campaign.

Two days later, the plaintiffs filed a Certificate of Service showing service of the complaint on Governor Granholm was accomplished.

The next day, on December 14, 2006, MCRIC and ACRF filed their motion to intervene under Federal Rule of Civil Procedure, Rule 24, along with a motion to dismiss the complaint under Rule 12(b)(6). They sought intervention in this lawsuit as drafters and sponsors of Proposal 2 and on behalf of their individual members, some of whom are Michigan citizens, residents, and taxpayers who will be subject to, and will expect the State to comply with, the mandates of equal treatment and equal opportunity embodied within Section 26. On that same day, Attorney General Michael Cox filed his motion to intervene purportedly claiming to represent the People of Michigan. App. B-5. The Attorney General's motion was granted that same day and the district court ordered him to file his answer to the University

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[2] The cross-claim was dismissed with prejudice. App. B-5.

Defendants' motion for preliminary injunction on or before December 18, 2006. *Id.*

While waiting for the district court to rule on their motion to intervene, MCRIC and ACRF filed an opposition to the University Defendants' motion for preliminary injunction on December 18, 2006, and on December 19, 2006, they filed a request to expedite the hearing on their motion to intervene.

Unknown to MCRIC and ACRF, on December 18, 2006, the parties to the lawsuit along with the Attorney General entered into a stipulation consenting to an injunction suspending enforcement of Proposal 2 as it relates to the University Defendants and stipulating to the dismissal of the Universities' cross-claim. *Id.*

Also unknown to MCRIC and ACRF, on December 19, 2006, without a hearing and without a determination of the likelihood of success on the merits or any consideration of the public interest, the district court enjoined Proposal 2, consistent with the parties' stipulation, as it relates to the University Defendants' current admissions and financial aid cycles until July 1, 2007. The district court found that "the interests of all parties and the public are represented adequately through the state defendants and their various elected representatives, and the Court, therefore, will approve the stipulation."

C. The District Court Denies Petitioners' Motion to Intervene

It was not until December 27, 2006, that the district court denied MCRIC's and ACRF's motion to intervene as of right and by permission. The lower court recognized that "whether these organizations

[MCRIC and ACRF] have a sufficient interest in the outcome of this litigation is perhaps a close one." App. at B-14.

Nonetheless, the court found the Petitioners' motion to intervene was not timely, that they lacked substantial legal interest in the litigation, and that the Michigan Attorney General would adequately represent their interests. App. B-17, 18.

D. A Sharply Divided Sixth Circuit Panel Affirmed the District Court Holding That the Drafters and Sponsors of Proposal 2 Lacked a Substantial Legal Interest to Defend its Constitutionality in a Post-Election Challenge

On December 29, 2006, MCRIC and ACRF requested an expedited appeal of the order denying their motion to intervene. The Sixth Circuit granted their motion on January 9, 2007. On September 6, 2007, the Sixth Circuit affirmed the lower court finding that once the initiative is adopted, MCRIC and ACRF no longer have a substantial legal interest—but just a general ideological interest in seeing Proposal 2 defended and enforced, which is shared by the entire Michigan citizenry. App. A-19. Although the defendants in the underlying action are elected officials who opposed Proposal 2 prior to adoption and an intervening Attorney General who is an elected official that entered into a stipulation to enjoin Proposal 2, the Sixth Circuit said that it was the state's responsibility to enforce and defend the new law.

The dissent found that MCRIC and ACRF have a substantial legal interest and easily meet the other Rule 24(a) factors:

> When the government has passed a law, it can be trusted to administer it. When, as here, however, government did not pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

App. A-28 (Kennedy, C.J., concurring in part and dissenting in part). Although the majority opinion did not address the remaining intervention as-of-right elements, App. A-22, the dissent found that

> (1) the district court abused its discretion when it determined that the motion to intervene was not timely, (2) the ability of MCRIC and ACRF to protect its substantial legal interest may be impaired in the absence of intervention, and (3) that the Attorney General, as well as the other parties in the case, might not adequately represent that interest.

App. A-30 (Kennedy, C.J., concurring in part and dissenting in part).

Although MCRIC and ACRF were denied intervention, they continue to defend Section 26 as amici curiae. They filed an amicus brief in *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 243 (6th Cir. 2006), and in the federal district court to support motions to dismiss and/or for summary judgment on January 18, 2008. Although the plaintiffs opposed their intervention, Ward Connerly of ACRF and Jennifer Gratz of MCRIC have been deposed and were required to produce documents.

Judgment was entered on September 6, 2007. On December 17, 2007, the petition for rehearing and rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Proposal 2, the Michigan Civil Rights Initiative, was a highly contentious citizen initiative to prohibit the state and its political subdivisions from using race and sex in public contracting, public education, and public employment. Many of the same plaintiffs and their attorneys appeared in both the pre- and post-election challenges to the initiative. *Compare Operation King's Dream*, 501 F.3d 584, with this post-election challenge. Although the plaintiffs who opposed the citizen initiative in the pre-election challenges are allowed to file and prosecute post-election challenges, the measure's drafters and sponsors may be heard only by intervening in post-election lawsuits.

In the decision below, the Sixth Circuit affirmed the denial of intervention as of right under Rule 24(a)(2), denying the drafters and sponsors of Proposal 2 any opportunity to defend their initiative, even though the court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts." Apps. A-15 & B-14. The lower court reasoned that once the initiative had been approved by the voters, the measure's drafters and sponsors have only a "generic interest" in its defense against legal attack. The defense and enforcement of Proposal 2 must be

"entrusted" to elected state officials, even if those very officials had vigorously opposed the philosophy and objectives of the initiative during the campaign.

In contrast, the dissent recognized that the decision below rested on precedent that "altered the Rule 24(a) landscape." App. A-25 (Kennedy, C.J., concurring in part and dissenting in part). Moreover, the dissent noted that the majority's confidence that public officials can be "entrusted" with the defense of initiatives they oppose was misplaced.

> When the government has passed a law, it can be trusted to administer it. When, as here, however, a government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

App. A-28. The dissent reasoned:

> [I]t follows that *some* representative of the voters has a "substantial interest" in defending that position: I agree with the Ninth Circuit's conclusion in [*Wash. State Bldg. & Constr. Trades Council, AFL-CIO v.*] *Spellman*, [684 F. 2d 627 (9th Cir. 1982)] that the sponsor of the measure should be that representative.

App. A-29.

This case squarely raises the important, recurring question of whether drafters and sponsors of ballot initiatives who have expended time and money in supporting and defending their initiatives in the pre-

election arena, should be permitted under Rule 24(a)(2) to defend their newly-adopted laws when they are challenged in post-election lawsuits. Other circuits permit drafters and sponsors to intervene as of right in actions challenging the laws they worked so hard to bring into existence. In the decision below, the Sixth Circuit comes into conflict with decisions of the Ninth Circuit and other courts, in ruling that upon passage of a ballot initiative, the measure's drafters and sponsors have no greater interest in defending the validity of the newly adopted law than the general public, and are not entitled as a matter of right to intervene in an action challenging the legality of the measure.

If the opinion below is allowed to stand, it will have a chilling impact on citizens' use of the initiative process as a mode of political expression. For this reason, and because the Federal Circuit Courts of Appeals are hopelessly divided on whether the drafters and sponsors of ballot initiatives have a substantial legal interest sufficient to support intervention as a matter of right, this Court should grant the Petition and establish doctrinal uniformity on this crucial issue.

I

THERE IS A DIRECT CONFLICT BETWEEN THE SIXTH AND NINTH CIRCUITS ON WHETHER THE SPONSORS OF CITIZEN INITIATIVES ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT UNDER RULE 24(a)

This Court has rarely considered what type of interest applicants must show to intervene as of right under Rule 24(a)(2), since the Court amended the provision in 1966. Given the lack of guidance from this

Court, the primary responsibility for interpreting the requisite interest has fallen to the lower courts. Unsurprisingly, however, the advisory committee notes and a "paucity of [this Court's] decision[s] on intervention of right have resulted in widely varying interpretations of the Rule 24(a) requirements." Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. Chi. L. Rev. 279, 283 (1990); *accord*, Carl Tobias, *Standing to Intervene*, 1991 Wis. L. Rev. 415, 416 ("[T]he federal judiciary has experienced considerable difficulty in delineating exactly what applicants must demonstrate to intervene of right."). This case raises an important and recurring question of whether sponsors of a popular initiative have an interest in the outcome of litigation challenging the measure's constitutionality that is sufficient to allow the group to intervene in such litigation as a matter of right. Attempting to resolve this question has led to a sharp split between the Sixth and Ninth Circuit Courts of Appeals.

Rule 24(a)(2) provides that intervention of right shall be granted to anyone who

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In evaluating these criteria, the Sixth Circuit recognizes that intervention as of right must be granted if a proposed intervenor establishes four elements: (1) the motion to intervene is timely; (2) the intervenor has a substantial legal

interest in the subject matter of the case; (3) its ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent its interest. App. A-13 (citing *Grutter v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir. 1999)). The Sixth Circuit also recognizes that Rule 24 "should be broadly construed in favor of potential intervenors." *Id.*

Yet, in applying these factors to the drafters and sponsors of Proposal 2, the Sixth Circuit found that Petitioners lacked an interest sufficient to warrant intervention in an action challenging the law that came into existence primarily because of their efforts. MCRIC's and ACRF's "status as organizations involved in the process leading to the adoption of Proposal 2 is insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by Proposal 2." App. A-18. The court opined that unless an initiative's sponsors are "regulated by the new law, . . . [they have] only a general ideological interest in the lawsuit." *Id.*

In sharp contrast, when the Ninth Circuit evaluated the criteria of Rule 24(a), that Circuit concluded that a public interest group was entitled as a matter of right to intervene in an action challenging the legality of the measure it had sponsored. *Wash. State Bldg. & Constr. Trades Council, AFL-CIO v. Spellman*, 684 F.2d 627 (9th Cir. 1982), *cert. denied sub nom., Don't Waste Wash. Legal Def. Found. v. Washington*, 461 U.S. 913 (1983). In *Spellman*, a challenge was brought against a Washington statute adopted by initiative that closed the borders of Washington to the entry of radioactive waste

originating outside the state. Don't Waste Washington (DWW), a public interest group that sponsored the challenged initiative, sought to intervene in the lawsuit challenging the new law. Although intervention of right was denied to DWW by the district court, the Ninth Circuit reversed, holding:

> Denial of DWW's motion to intervene was error and accordingly we reverse as to that holding. Rule 24 traditionally has received a liberal construction in favor of applicants for intervention. DWW, as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a).

Id. at 629-30.

This was not an isolated ruling; rather, it embodies the well established precedent of the Ninth Circuit. For example, *Spellman* was cited with approval in *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980). *Freeman* involved a suit by the States of Idaho and Arizona against the General Services Administration, challenging the procedures for ratification of the Equal Rights Amendment. The National Organization of Women (NOW) sought to intervene pursuant to Rule 24(a). The district court denied NOW's motion, but the Ninth Circuit reversed, holding that "NOW has such an interest in the continued vitality of ERA, which would as a practical matter be significantly impaired by an adverse decision and which is incompletely represented here." *Freeman*, 625 F.2d at 887.

Similarly, in *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983), a public interest

group was found to have a substantial interest in defending the legality of a measure it had supported. *Id.* There the Audubon Society, which had supported the creation of a conservation area in Idaho, sought to intervene in an action challenging the federal statute that created that conservation area. *Id.* The Ninth Circuit held that the group had a protectable interest in defending the creation of the conservation area. "[A] public interest group [is] entitled as a matter of right to intervene in an action challenging the legality of a measure which it had supported." *Id.* The court recognized that an adverse decision against the conservation area "would impair the society's interest in the preservation of birds and their habitats," an interest the conservation area was designed to protect. *Id.* at 528.

Until 2007, the Sixth Circuit was in accord with the Ninth Circuit and cited Ninth Circuit decisions for the proposition that a "public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997). That changed when the Sixth Circuit handed down *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323 (6th Cir. 2007), *cert. denied sub nom., Standing Together to Oppose Partial-Birth-Abortion v. Northland Family Planning Clinic, Inc.*, 128 S. Ct. 873 (2008). In that case, the Sixth Circuit found that an advocacy organization opposing abortion was not entitled to intervene as of right in an action challenging the constitutionality of legislation enacted by the Michigan Legislature. *Id.* at 327. To the majority below, this outcome "control[led]" its disposition of the present

case. App. A-15, 16. It is true, however, as the dissent below points out, that "the majority can only rely on *Northland Family Planning* because that case fundamentally altered the Rule 24(a) landscape." App. A-25 (Kennedy, C.J., concurring in part and dissenting in part). Prior Sixth Circuit precedent was consistent in holding that "interest" was to be construed liberally and "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Id.* Nevertheless, the Sixth Circuit's current jurisprudence, as exemplified by *Northland Family Planning* and now the case at bar, is in irreconcilable conflict with the Ninth Circuit's precedent of *Spellman*, *Freeman*, and *Sagebrush Rebellion*.

The direct and dramatic conflict between the Sixth and Ninth Circuits over whether sponsors of popular initiatives are entitled to intervene as of right to defend those measures in post-election constitutional challenges is an issue of major national significance that can only be—and must be—resolved by this Court.

II

CONTRARY TO THE MAJORITY BELOW, ELECTED OFFICIALS CAN NOT BE PRESUMED TO ADEQUATELY REPRESENT THE INTERESTS OF THE SPONSORS OF PROPOSAL 2 FOR PURPOSES OF DENYING INTERVENTION UNDER RULE 24(a)

The initiative process exists to give the people an alternative means to express their political will when elected officials prove unable or unwilling to effectuate it. When the people of a state resort to the initiative

process to amend their state's constitution, this fact is prima facie evidence that the electorate lacks confidence in their elected representatives and public officials to adopt or apply the policies in question. Evidence of such a division between the expressed interests of the people and those of political office holders is especially compelling in cases like the one at bar, in which the state's top elected officials have aligned themselves *against* Proposal 2, despite its overwhelming support among the electorate.

A. Both the Majority and Dissent Below Recognized That the Substantiality of Petitioners' Legal Interest in This Litigation Is Closely Tied Up With Whether Michigan's Elected Officials Can Adequately Represent and Protect That Interest

The court below twice states that its ruling was limited to determining that Petitioners lacked the requisite substantial legal interest in the subject matter of this litigation to warrant intervention under Rule 24(a). App. A-13, 18. Yet, in fact this holding—and the contrary opinion of the dissent—is closely wrapped up with the question of whether elected officials who oppose a popular initiative can adequately represent the interests of the measure's sponsors, as is required by Rule 24(a), if those sponsors are to be denied intervention of right.

The majority below was confident that, "in a challenge to the constitutionality of an already-enacted statute . . . the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." App. A-17 (quoting *Northland*

Family Planning, 487 F.3d at 345). *Because* of the majority's sanguine view that matters of enforceability could be "entrusted for the most part to the government," Petitioners' interest in defending the constitutionality of Proposal 2 was found to be insufficiently substantial to merit intervention as of right. *Id.*

In contrast, the dissent below recognized that "the groups here have raised reasons why they cannot rely on the office of the Michigan Attorney General to vigorously advocate the constitutionality of Proposal 2." App. A-25. And *because* of this recognition that the state's officials cannot adequately represent Petitioners' interests, the dissent found that Petitioners have a substantial legal interest in defending the constitutionality of Proposal 2 sufficient to warrant intervention of right. App. A-30. The special place of the initiative process in our American democracy supports Judge Kennedy's dissent.

B. Popularly Enacted Initiatives Are Distinct from Laws Adopted Through the Legislative Process and When Such Citizen-Adopted Laws Are Challenged in Court, Elected Officials Cannot Be Presumed to Adequately Represent the Interests of the Drafters and Sponsors of Those Laws

Ordinarily, there is a presumption that when the government is a party to a lawsuit in its representative capacity, it will protect the interests of all citizens, including public interest groups. Vreeland, *supra*, at 284. But that presumption falters when a law is adopted by initiative—essentially a means of circumventing Legislatures and elected officials.

Initiatives are enacted because the mainstream political process has become unresponsive to the popular will. K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 Temp. L. Rev. 821, 833 (2006). No matter how disillusioned they may be with a state's political establishment, voters can reasonably rely upon an initiative's drafters and sponsors to defend the newly adopted law. When a successful initiative's sponsors are not allowed to intervene as of right to defend the measure's legality, the people no longer have a champion to uphold their exercise of the political process.[3] Any judge who disagrees with the political policies embodied in an initiative amendment can cripple the measure's chances of being upheld in court by blocking the initiative's sponsors from participating in its legal defense.

When sponsors of initiatives are not allowed to intervene in their defense as of right, there is a palpable risk that the newly adopted law will be emasculated by stipulated dispositions among the putatively—but not actually—adverse parties to a

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[3] Many initiatives center on public rights and their resolution will affect numerous individuals and entities. When there are legal challenges to initiatives after they have been adopted, these types of "public law cases usually involve high stakes and widespread impacts, their adjudication often 'call[s] for adequate representation in the proceedings of the range of interests that will be affected by them.' Public interest groups have been instrumental in filling this role." Vreeland, *supra*, at 280-81 (citation omitted). Further, unlike private disputes, remedies in these types of cases focus not just on the dispute between the parties, but on remedies that are forward looking and affect large numbers of people in society. Danielle R. Holley, *The Failure of Intervention as a Procedural Device in Affirmative Action Litigation*, 54 Case W. Res. L. Rev. 103, 125 (2003).

legal challenge. "While one hopes that such backroom dealings are the rare exception, similar conflicts arise whenever the institution or counsel charged with defending a policy includes elements opposed to that policy." Alan Jenkins, *Foxes Guarding the Chicken Coop: Intervention as of Right and the Defense of Civil Rights Remedies*, 4 Mich. J. Race & L. 263, 316 (1999).

This risk is not diminished even if the particular individuals in office support the new law at the time a challenge is filed. Litigating the constitutionality of a popularly enacted initiative to a final appellate disposition in federal court can take years, and a change in office-holders while a lawsuit is pending can doom the measure if incoming officials oppose it on political grounds. This was implicitly recognized by the Ninth Circuit in *Sagebrush Rebellion*, a decision that rested in part on a change in the Department of Interior's political perspective and on the new Secretary's prior association with legal counsel for the opponents of the challenged measure. 713 F.2d at 528.

Thus, in determining the requisite interest to intervene as of right, the distinction between a law generated by elected officials and one adopted by the voters is a compelling one. Yet the court below dismissed the difference between mere lobbying for legislation and drafting, sponsoring, and enacting a popular initiative as "razor-thin," App. A-20 n.2. Relying on *Northland Family Planning*, the Sixth Circuit held that Petitioners lacked an adequate legal interest to intervene, because once the initiative that they drafted, supported, and defended became law, their interest was converted into "only a general ideological interest in seeing that Michigan enforces Proposal 2." App. A-19. In contrast, the dissent

recognized that there is a vital distinction between a legislatively enacted statute in which "the public interest in its enforceability is entrusted for the most part to the government," and an exercise of the initiative process whereby the "government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (*arguably because their elected officials would not accede to their will*)." App. A-28 (emphasis added) (Kennedy, C.J., concurring in part and dissenting in part).

C. Since Michigan's Elected Officials Cannot Adequately Represent Petitioners' Interest in Upholding the Constitutionality of Proposal 2, Petitioners Have a Substantial Legal Interest in Participating in the Defense of the Measure They Sponsored, and Should Be Granted Intervention as of Right

The burden of showing that the interests of an initiative's sponsors are not adequately represented by public officials already participating in the litigation should be minimal. Although this Court has not addressed the issue since the 1966 amendments, its prior position was clear: "The requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). This standard was historically in accord with Sixth Circuit precedent, which recognized that "[o]ne is not required to show that the representation will in fact be inadequate. For

example, it may be enough to show that the existing party who purports to seek the same outcome will not make all of the prospective intervenor's arguments." *Miller*, 103 F.3d at 1247. A showing of *possibly* inadequate representation should be sufficient to meet this burden. *Linton v. Comm'r of Health & Env't, State of Tenn.*, 973 F.2d 1311, 1319 (6th Cir. 1992). Neither *Northland Family Planning* nor the decision below presents any compelling reason to *increase* this burden for sponsors of successful voter initiatives, such as Petitioners.

In the case at bar, Petitioners not only drafted Proposal 2, they were continually at the forefront of the protracted campaign to adopt the measure, defended it in pre-election litigation, and are committed to ensuring its constitutionality and timely implementation. Petitioner MCRIC was formed by the drafters, sponsors, and supporters of Proposal 2 to promote its adoption. It is registered with the Michigan Secretary of State as the official Ballot Question Committee for Proposal 2, for the purpose of reporting all campaign statements as required by Michigan law. Members of Petitioner ACRF helped draft, sponsor, and support Proposal 2. App. A-14, 15. As the Sixth Circuit recognizes, Proposal 2 "would not have reached the ballot without their efforts." App. A-15. Moreover, Petitioners have demonstrated a strong and continuing institutional interest in upholding and enforcing Proposal 2.

Both the district court and the Sixth Circuit found that the Michigan Attorney General, who was allowed to intervene in this action, will adequately represent the foregoing interests, thereby justifying the denial of Petitioners' application to intervene as of right. Yet

instead of vigorously defending the constitutionality of Section 26 and ensuring timely compliance with the law, the Attorney General promptly entered into a stipulation consenting to an injunction. This action shows his unwillingness to vigorously defend Proposal 2. Moreover, the Attorney General defended the district court's order enjoining Proposal 2 by filing a response in opposition to the emergency motion for stay pending appeal. The Attorney General argued "extensively about the hardships of complying with the law." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d at 247.

This record demonstrates that Petitioners have a reasonable basis for their apprehension that Michigan's elected officials do not share and will not adequately represent their interest in vigorously defending the constitutionality of Proposal 2. And since, under the reasoning of both the majority and the dissent below, the adequacy with which Petitioners' interests will be represented effectively determines the substantiality of those interests for purposes of granting intervention under Rule 24(a), this Court should grant the Petition and establish a uniform rule of law granting intervention as of right to Petitioners and all similarly situated sponsors of popular initiatives.

III

IF ALLOWED TO STAND, THE DECISION BELOW WILL HAVE A CHILLING EFFECT ON THE EXERCISE OF POLITICAL EXPRESSION VIA THE INITIATIVE PROCESS

This case turns on the significance of the initiative process as a crucial element in America's democratic political system. The vast majority of this country's political participation is channeled through the representative process, whereby voters elect legislators and other officials to implement the popular will. But the system does not work perfectly, and when significant divergences arise between the will of the people and the outcome of representative politics, nearly half of the states, including Michigan, have provided a "safety valve" of direct democracy.[4] This is the function and importance of the initiative process.

Sometimes referred to as the "fourth branch of government," the initiative process complements the representative system "by bringing government closer to the people and making Legislatures more accountable." Jodi Miller, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs*, 1999 Ann. Surv. Am. L. 1, 6-7. This exercise of direct democracy enables ordinary citizens to propose a law or constitutional amendment, place it on the ballot, and vote to adopt it, all without aid or interference by

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[4] Twenty-three states and the District of Columbia give their citizens some opportunity to bypass their Legislatures completely through citizen-initiatives and referendums. DuVivier, *supra*, at 833.

their Legislature. The initiative process may often be the last refuge of a disgruntled and disaffected electorate, since "initiatives are less encumbered by special interest influences than are representatives in state capitals." *Id.* at 7 (citing Thomas E. Cronin, *Direct Democracy: The Politics of the Initiative, Referendum and Recall* 8 (1989)). Probably for the same reason, "[p]olls consistently demonstrate that citizens like the initiative process *and trust its outcomes more than they trust legislation enacted by their representatives.*" Elizabeth Garrett & Mathew D. McCubbins, *The Dual Path Initiative Framework*, 80 S. Cal. L. Rev. 299, 310 (2007) (emphasis added).

The use of the initiative process has surged in recent decades. John Gildersleeve, *Editing Direct Democracy: Does Limiting the Subject Matter of Ballot Initiatives Offend the First Amendment*, 107 Colum. L. Rev. 1437, 1438 n.5 (2007) (between 1990 and November 2006, 680 initiatives appeared on state ballots). The subject matter of citizen initiatives is broad and often controversial.[5] About 40% of the measures pass, *id.* at 1443, whereupon they are commonly challenged in court on procedural and substantive grounds. *Id.* Typically, the plaintiffs in these challenges are the political and ideological opponents of the newly adopted initiatives, and the defendants are state officials charged with enforcing and defending the laws.

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[5] In November 2004, there were 162 statewide ballot propositions. These measures ranged from a constitutional amendment to ban gay marriage, to bond issues for stem cell research, to measures to legalize marijuana. John G. Matsusaka, *Direct Democracy Works*, 19 J. of Econ. Persp. 185 (2005).

Unfortunately, as a necessary corollary of the nature of the initiative process, elected state officials may have little stake in enforcing or defending popularly enacted initiatives that were adopted partly as an expression of dissatisfaction with the existing political establishment. Not infrequently—as is true in the case at bar—*both* the plaintiffs and defendants in post-election challenges may be political opponents of the new law. Under such circumstances, vigorous and capable defense of a challenged initiative is possible *only* if the measure's drafters and sponsors have the right to intervene in post-election litigation.

Foreclosing the sponsors of popular initiatives from intervention as of right to defend the measures they helped enact from attack by their opponents defeats the "safety valve" function of direct democracy. By turning over the defense of Proposal 2 to the very officials the voters sought to bypass, the decision below will have a profound chilling effect on the people's exercise of the initiative process as a form of political expression. The voters are intelligent enough to realize that "when state officials block initiatives by surreptitiously undermining them, they follow their own preferences rather than those of the voters, and they do so in ways designed to reduce accountability." Garrett & McCubbins, *supra*, at 309. The inescapable conclusion is that the voice of disaffected citizens will be excluded from the political process, just as it will be excluded from the federal courtroom.

The Ninth Circuit has recognized that the sound arguments in favor of allowing sponsors of citizen initiatives to intervene as of right are policy related,

and that allowing such intervention will have significant participatory externalities:[6]

> A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with *a practical* interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.

Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 n.8 (9th Cir. 1995). The flip side of this coin is that a policy of *denying* intervention under Rule 24(a) deprives the citizen-supporters of initiatives of any voice in response to legal attacks by their ideological opponents—those who, by definition, could not command a majority at the polls. It is hard to imagine a more forceful repudiation of the democratic values the initiative process was designed to serve. At a time when America's democratic values are under

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[6] Even the granting of amicus status is insufficient in public law cases. Amicus status permits the public interest group a very limited role in the litigation. Amici do not participate in decree negotiations. More importantly, when a dispute centers on factual elements, "a party to the litigation is in a clearly superior position to insure that the range of issues and the evidence introduced in support of these issues conform to the viewpoint asserted by that party." Vreeland, *supra*, at 297 (citation omitted). Only parties to a suit have the opportunity to engage in discovery. *United States v. Stringfellow*, 783 F.2d 821, 828 (1986) ("[B]y engaging in independent discovery [the intervenor] might uncover facts that would affect the remedy in a manner favorable to it or would materially influence the settlement."). Here, although the drafters and supporters were denied intervention, they have been forced to submit to depositions and produce documents.

attack around the globe, a decision such as the one below, which can be expected to have a demoralizing and chilling effect on the use of democratic processes as a mode of political expression, cries out for review and redress by this Court.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the writ of certiorari.

DATED: March, 2008.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0362p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, Integration and Immigrant Rights and Fight For Equality By Any Means Necessary (BAMN), et al.,
Plaintiffs - Appellees,

Nos. 06-2653/2656

v.

JENNIFER GRANHOLM, et al.,
Defendants - Appellees,

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE; AMERICAN CIVIL RIGHTS FOUNDATION; TOWARD A FAIR MICHIGAN,
Proposed Intervenors - Appellants.

Appendix A–2

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Submitted: August 14, 2007

Decided and Filed: September 6, 2007

Before: KENNEDY, MARTIN, and COLE,
Circuit Judges.

COUNSEL

ON BRIEF: Sharon L. Browne, Alan W. Foutz, PACIFIC LEGAL FOUNDATION, Sacramento, California, Charles J. Cooper, Michael W. Kirk, COOPER & KIRK, Washington, D.C., Kerry L. Morgan, PENTIUK, COUVREUER & KOBILJAK Wyandotte, Michigan, Michael E. Rosman, CENTER FOR INDIVIDUAL RIGHTS, Washington, D.C., for Appellants. Philip J. Kessler, BUTZEL LONG, Detroit, Michigan, Leonard M. Niehoff, BUTSEL LONG, Ann Arbor, Michigan, George B. Washington, SCHEFF & WASHINGTON, Detroit, Michigan, Michael J. Steinberg, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, James E. Long, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

COLE, J,, delivered the opinion of the court, in which MARTIN, J., joined. KENNEDY, J. (pp. 10-13), delivered a separate opinion concurring in part and dissenting in part.

Appendix A–3

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U:S. COURTHOUSE
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Re: Case Nos. 06-2653; 06-2656
Coalition to Defend Affirmative Action, et al. v. Jennifer Granholm, et al.
District Court No. 06-15024

Dear Counsel:

Enclosed is a copy of a corrected page from the decision originally sent to you on September 6, 2007. Please make corrections in your publication version as indicated on page 1, counsel information.

Thank you for your cooperation in this matter.

Yours very truly,
Leonard Green, Clerk
By s/Linda K. Martin
(Mrs.) Linda K. Martin
Deputy Clerk

LKM/swh
Enclosure

cc: Honorable David M. Lawson
Mr. David J. Weaver, Cllerk
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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 07a0362p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION; COALITION TO DEFEND AFFIRMATIVE ACTION, Integration and Immigrant Rights and Fight For Equality By Any Means Necessary (BAMN), et al.,
Plaintiffs - Appellees,

Nos. 06-2653/2656

v.

JENNIFER GRANHOLM, et al.,
Defendants - Appellees,

MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE; AMERICAN CIVIL RIGHTS FOUNDATION; TOWARD A FAIR MICHIGAN,
Proposed Intervenors - Appellants.

Appendix A–6

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 06-15024—David M. Lawson, District Judge.

Submitted: August 14, 2007

Decided and Filed: September 6, 2007

Before: KENNEDY, MARTIN, and COLE,
Circuit Judges.

COUNSEL

ON BRIEF: Sharon L. Browne, Alan W. Foutz, PACIFIC LEGAL FOUNDATION, Sacramento, California, Charles J. Cooper, Michael W. Kirk, COOPER & KIRK, Washington, D.C., Kerry L. Morgan, PENTIUK, COUVREUE & KOBILJAL, Wyandotte, Michigan, Michael E. Rosman, CENTER FOR INDIVIDUAL RIGHTS, Washington, D.C., for Appellants. Philip J. Kessler, BUTZEL LONG, Detroit, Michigan, Leonard M. Niehoff, BUTSEL LONG, Ann Arbor, Michigan, George B. Washington, SCHEFF & WASHINGTON, Detroit, Michigan, Michael J. Steinberg, AMERICAN CIVIL LIBERTIES UNION FUND OF MICHIGAN, Detroit, Michigan, James E. Long, OFFICE OF THE ATTORNEY GENERAL, Lansing, Michigan, for Appellees.

COLE, J., delivered the opinion of the court, in which MARTIN, J., joined. KENNEDY, J. (pp. 10-13), delivered a separate opinion concurring in part and dissenting in part.

OPINION

R. GUY COLE, JR., Circuit Judge. Before us are two appeals challenging a district court's order denying intervention under Federal Rule of Civil Procedure 24(a) and (b) to (1) the Michigan Civil Rights Initiative committee (the "MCRI"), (2) the American Civil Rights Foundation (the "ACRF"), and (3) Toward a Fair Michigan's ("TAFM," collectively, the "proposed intervenors").[1] Each wishes to intervene in an action brought against (1) Jennifer Granholm, the Governor of Michigan, and (2) the Regents of the University of Michigan, the Board of Trustees of Michigan State University, and the Board of Governors of Wayne State University (collectively, the "Universities"), seeking to invalidate and permanently enjoin from enforcement a recently enacted amendment to Michigan's constitution that outlaws, among other things, sex- and race-based preferences in public education, public employment, and public contracting. Mich. Const., art. 1, § 26. The amendment was the result of the Michigan voters' approval, in November 2006, of Proposal 06-2 ("Proposal 2"), a statewide ballot initiative. For the following reasons, we AFFIRM the district court's denial of intervention to the proposed intervenors.

[1] The district court similarly denied the City of Lansing's attempt to intervene, and the City of Lansing also appealed. The City of Lansing, however, has since voluntarily dismissed its appeal. *See Coalition to Defend Affirmative Action v. Granholm*, No. 06-2658 (6th Cir. Aug. 8, 2007) (order).

I. BACKGROUND

From approximately July 2004 through December 2004, the MCRI, with the assistance of paid agents, solicited signatures in support of placing a statewide ballot initiative, which would later become Proposal 2, on Michigan's November 2006 general election ballot. *Operation King's Dream v. Connerly*, ___ F.3d ___, 2007 WL 2416815, at *1 (6th Cir. 2007). Proposal 2 has been characterized as "anti-affirmative action," *Operation King's Dream v. Connerly*, ___ F. Supp. ___, 2006 WL 2514115, at *1 (E.D. Mich. 2006), because, if approved, it would amend Michigan's constitution to prohibit the state from granting "preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Mich. Const., art. 1, § 26; *see also, e.g., Operation King's Dream*, 2006 WL 2514115, at *2-3. Indeed, Proposal 2's path to the ballot was not without controversy. *Operation King's Dream*, 2007 WL 2416815, at *6 ("By all accounts, Proposal 2 found its way on the ballot through methods that undermine the integrity and fairness of our democratic processes."). Nonetheless, on November 7, 2006, Michigan voters approved Proposal 2, with approximately 57.9% of voters favoring it. *See* State Proposal—06-2: Constitutional Amendment: Ban Affirmative Action Programs, at http://miboecfr.nictusa.com/election/results/06GEN/90000002.htm1 (last visited Aug. 11, 2007). After its approval, Proposal 2 was scheduled to go into effect on December 23, 2006. *See* Mich. Const. art. 12, § 2.

The day after the election, however, on November 8, the Coalition to Defend Affirmative Action, Integration and Immigrant Rights, and Fight for Equality By Any Means Necessary, along with other organizations and individuals (collectively, the "Plaintiffs"), filed suit in the Eastern District of Michigan against Governor Granholm and the Universities, seeking a declaratory judgment that the amendment was invalid and a permanent injunction against its enforcement. "In their amended complaint, [P]laintiffs contended that Proposal 2 violates two federal constitutional provisions (the First and Fourteenth Amendments), three federal civil rights statutes (Title VI, Title VII[,] and Title IX)[,] and one presidential order (Executive Order 11246)." *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 241 (6th Cir. 2006). And on December 11, the Universities filed a cross-claim against Governor Granholm, seeking a preliminary injunction permitting them to continue using their existing admissions and financial-aid policies through the end of the 2007 admissions cycle.

On December 14, three days after the Universities filed their cross-claim, the Michigan Attorney General, Michael Cox, moved to intervene in the lawsuit. That same day, the MCRI and the ACRF jointly moved to intervene as well. The district court ruled on only the Attorney General's motion, granting it that day.

On December 18, TAFM and Eric Russell, a white applicant to the University of Michigan Law School, jointly moved to intervene in the lawsuit. That same day, before the district court issued its ruling on the four pending intervention motions (the MCRI's, the

ACRF's, TAFM's, and Eric Russell's), the Plaintiffs in the underlying suit and the three sets of parties to the cross-claim filed a stipulation with the district court, which read in relevant part:

> It is hereby stipulated, by and between the parties that this Court may order as follows:
>
> (1) that the application of Const[.] 1963, art[.][1], § 26 to the current admissions and financial aid policies of the University parties is enjoined through the end of the current admissions and financial aid cycles and no later than 12:01 a.m. on July 1, 2007, at which time this Stipulated Injunction will expire;
>
> (2) that, pursuant to Fed. R. Civ. P. 41(a)(1) and 41(c), the Universities' cross-claim shall be and hereby is dismissed in its entirety, with prejudice only as to the specific injunctive relief requested in the cross-claim [.]. . .

Coal. to Defend Affirmative Action, 473 F.3d at 242. On December 19, the district court entered a preliminary injunction, consistent with the parties' stipulation, enjoining the application of Proposal 2 to the Universities' admissions and financial-aid policies until July 1, 2007, and dismissed the Universities' cross-claim. *Coal. to Defend Affirmative Action v. Granholm*, No. 2:06-cv-15024-DML-RSW, slip op. at 3 (E.D. Mich. Dec. 19, 2006) (order).

Having received no response to their motions to intervene, on December 21, Eric Russell and TAFM filed a notice of appeal in this Court, and, the day after that, "they filed in this [C]ourt an 'Emergency Motion for a Stay Pending Appeal' of the district court's preliminary injunction and a Petition for a Writ of Mandamus directing the district court to grant their motion to intervene and to vacate its preliminary injunction." *Coal. to Defend Affirmative Action*, 473 F.3d at 242.

On December 27, 2006, the district court granted Eric Russell's motion to intervene but denied the MCRI's, the ACRF's, and TAFM's motions both as of right and by permission. *Coal. to Defend Affirmative Action v. Granholm*, No.2:06-cv-15024-DML-RSW (E.D. Mich. Dec. 27, 2006) (order). The next day, Eric Russell amended his "Emergency Motion for a Stay Pending Appeal," and the MCRI, the ACRF, and TAFM all appealed the denials of their motions to intervene.

On December 29, 2006, based on Eric Russell's "Emergency Motion for a Stay Pending Appeal," a panel of this Court stayed the district court's preliminary injunction pending appeal, allowing article I, section 26 of the Michigan Constitution to take immediate effect. *Coal. to Defend Affirmative Action*, 473 F.3d at 253. The merits appeal of the district court's preliminary injunction is still pending before this Court.

II. ANALYSIS

"This is but one piece of litigation spurred by the Proposal 2 saga." *Operation King's Dream*, 2007 WL 2416815, at * 1. Today, we address only the appeals of the district court's order denying intervention as of right and by permission to the MCRI, the ACRF, and TAFM. As discussed more fully below, because none of the proposed intervenors have a substantial legal interest in the subject matter of the case, the district court properly denied their motions for intervention as of right. Further, the district court acted within its discretion when it denied them permissive intervention. Fed. R. Civ. P. 24(b).

A. Intervention as of Right

Rule 24(a) of the Federal Rules of Civil Procedure entitles certain parties to intervene in a lawsuit as of right:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). We have explained that a proposed intervenor must establish four factors before being entitled to intervene: (1) the motion to intervene

is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect their interest maybe impaired in the absence of intervention; and (4) the parties already before the court cannot adequately protect the proposed intervenor's interest. *Gruffer v. Bollinger*, 188 F.3d 394, 397-98 (6th Cir, 1999). Acknowledging that Rule 24 should be "broadly construed in favor of potential intervenors," *Purnell v. City of Akron*, 925 F.2d 941, 950 (6th Cir. 1991), the district court nevertheless held that none of the proposed intervenors met any of the four factors.

"We review de novo motions to intervene as of right, except for the timeliness element, which is reviewed for an abuse of discretion." *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 244 (6th Cir. 2007) (citing *Grutter*, 188 F.3d at 98). A district court abuses its discretion only when we are "left with the definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors or where the trial court improperly applies the law or uses an erroneous legal standard." *Paschal v. Flagstar Bank*, 295 F.3d 565, 576 (6th Cir. 2002) (citations, alterations, and internal quotation marks omitted).

We begin by addressing whether the proposed intervenors have a substantial legal interest in the litigation. Because we conclude that none do, we need not address the remaining factors. *See, e.g., Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989) ("[A] failure to meet [any] one of the [four factors] will require that the motion be denied.").

1. *Substantial Legal Interest*

"The proposed intervenors must show that they have a substantial interest in the subject matter of this litigation." *Grutter*, 188 F.3d at 398 (citing *Jansen v. City of Cincinnati*, 904 F.2d 336, 341. (6th Cir. 1990)). Although we have noted that this Circuit "has opted for a rather expansive notion of the interest sufficient to invoke intervention of right," *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245 (6th Cir. 1997), this does not mean that any articulated interest will do. *See, e.g., Northland Family Planning*, 487 F.3d at 244; *accord Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) ("[T]his does not mean that Rule 24 poses no barrier to intervention at all."). Of course, establishing a substantial legal interest "is necessarily fact-specific." *Miller*, 103 F.3d at 1245.

a. *The MCRI and the ACRF*

According to the MCRI and the ACRF, "they were at the forefront of the protracted campaign to adopt Proposal 2 and are committed to ensuring its constitutionality and timely implementation." The MCRI, headed by Jennifer Gratz, the lead plaintiff in *Gratz v. Bollinger*, 539 U.S. 244 (2003), is registered with the Michigan Secretary of State as the official ballot-question committee for Proposal 2, and was, by all accounts, the driving force behind the controversial solicitation of signatures necessary to place Proposal 2 on the ballot. *See Operation King's Dream*, 2007 WL 2416815, at *2. The ACRF is a public-interest corporation dedicated to eradicating sex and race preferences throughout the United States. Ward Connerly, an ACRF board member, was instrumental

in the passage of Proposition 209 in California, which similarly banned "preferential treatment to, any individual or group an the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." *Coal. for Economic Equity v. Wilson*, 122 F.3d 692, 696 (9th Cir. 1997) (quoting Cal. Const. art 1, § 31(a)). Indeed, by design, Proposal 2 tracks the language of Proposition 209. The MCRI and the ACRF worked together, expending labor and funds, to see that Proposal 2 found its way on Michigan's November 2006 general election ballot and to see that the Michigan voters approved Proposal 2. The district court recognized that "[i]t would not be unreasonable to posit that [Proposal 2] would not have reached the ballot without their efforts." *Coal. to Defend Affirmative Action*, slip op. at 11.

Both the MCRI and the ACRF argue that as groups substantially involved in the process leading to the adoption of the challenged amendment, they have a legal interest in the subject matter of this lawsuit. They rely primarily an our decisions in *Grutter* and *Miller*, as well as several Ninth Circuit decisions that we have cited favorably. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397-98 (9th Cir. 1995); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526-28 (9th Cir. 1983); *State of Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980). We, however, conclude that our precedent requires a contrary conclusion. Since the district court denied the proposed intervenors motions back in December, we decided *Northland Family Planning*, which is directly on point and controls our disposition.

In *Northland Family Planning*, six health-care facilities and four physicians filed suit against various Michigan officials, seeking to invalidate and enjoin the enforcement of the Legal Birth Definition Act, which "prohibit[ed] the practice colloquially referred to as partial-birth abortions." 487 F.3d at 327-28. Like Proposal 2, the Legal Birth Definition Act became law after a successful proposal by a citizen initiative petition. *Id.* at 327. Prior to the district court holding the Act unconstitutional (which we affirmed), a group called "Stand Together to Oppose Partial-Birth-Abortion" ("STTOP") moved to intervene in the litigation under Federal Rule of Civil Procedure 24(a) and (b). *Id.* at 328. Similar to the MCRI and the ACRF, "STTOP is a ballot-question committee, which was formed to promote the passage and continued viability of the Legal Birth Definition Act." *Id.* at 328, 344. The district court denied STTOP's motion to intervene, and we affirmed. *Id.* at 343-46.

In affirming the denial of STTOP's motion to intervene, we held that an organization involved in the process leading to the adoption of a challenged law, does not have a substantial legal interest in the subject matter of a lawsuit challenging the legality of that already-enacted law, unless the challenged law regulates the organization or its members. *Id.* In so holding, we drew a distinction between cases involving challenges "to the *procedure* required to pass a particular rule, as opposed to the government's subsequent *enforcement* of the rule after its enactment." *Id.* at 345 (second emphasis added). In drawing this distinction, we explained that "the public at large—including public interest groups—has an interest in the procedure by which a given legal

requirement is enacted as a matter of democratic legislative process." *Id.* "(On the other hand," we further explained, "in a challenge to the constitutionality of an already-enacted statute, as opposed to the process by which it is enacted, the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the legislative process becomes less relevant." *Id.*; *accord Providence Baptist Church v. Hillandale Comm., Ltd.*, 425 F.3d 309, 316 (6th Cir. 2005) (affirming the denial of a motion to intervene as of right by a committee that existed to support the passage of a local referendum to amend a zoning ordinance). Thus, had STTOP sought to intervene in a suit challenging the legislative process by which the statute was enacted, then it likely would have had a substantial legal interest in the lawsuit due to its involvement in the passage of the statute. *Northland Family Planning*, 487 F.3d at 345-46. But, after that statute's enactment, STTOP's interest in a suit challenging the enforcement of the statute became insubstantial "due to the state's responsibilities in enforcing and defending it as it is written." *Id.* at 346.

Like STTOP's relationship to the Legal Birth Definition Act, the MCRI was created and continues to exist for the purpose of passing and upholding Proposal 2. *See id.* at 345. The ACRF's goals are, of course, more national, but for the purposes of this case, its relationship to Proposal 2 and interest in the underlying litigation is identical to the MCRI's. That is, like STTOP, their "legal interest can be said to be limited to the passage of [Propasal 2] rather than the state's subsequent implementation and enforcement of it." *Id.* No doubt, each group was instrumental in

Proposal 2 's path to the ballot and ultimate approval. Their interest in seeing Proposal 2 enforced, however, "is greatly diminished due to the state's responsibilities in enforcing and defending [Proposal 2] as written." *Id.* at 346. Therefore, *Northland Family Planning* compels us to hold that the MCRI's and the ACRF's status as organizations involved in the process leading to the adoption of Proposal 2 is insufficient to provide them with a substantial legal interest in a lawsuit challenging the validity of those portions of Michigan's constitution amended by Proposal 2.

This is not to say that all organizations that advocate for the passage of a law lack a substantial legal interest in a suit challenging the government's subsequent enforcement of that law. Indeed, we have held that where a group is "regulated by the new law, or, similarly, whose members are affected by the law, may likely have an ongoing legal interest in its enforcement after it is enacted." *Id.* at 345; *accord, e.g., Grutter*, 188 F.3d at 401(holding that proposed intervenors, who were applicants to the University of Michigan, had a substantial legal interest in the school's admissions process); *Miller*, 103 F.3d at 1247 (holding that the Michigan Chamber of Commerce had a substantial legal interest where it was regulated by at least three of the four statutory provisions challenged by plaintiffs). Where, however, an organization has only a general ideological interest in the lawsuit like seeing that the government zealously enforces some piece of legislation that the organization supports—and the lawsuit does not involve the regulation of the organization's conduct, without more, such an organization's interest in the lawsuit cannot be deemed substantial. *See Northland Family Planning*,

487 F.3d at 346 (explaining that an organization's interest pertaining only to enforceability of a statute in general is not cognizable as a substantial legal interest without the statute also regulating the organization or its members).

Here, the MCRI and the ACRF have only a general ideological interest in seeing that Michigan enforces Proposal 2. Each group asserts that its mission to enforce civil-rights laws at all levels of government will be impeded if not granted intervention. To be sure, neither the MCRI nor the ACRF maintains that it or its members are specifically regulated by those portions of Michigan's constitution amended by Proposal 2. The most they claim is that Proposal 2 naturally affects them because each group has at least a few members that are Michigan residents. This, however, amounts to only a generic interest shared by the entire Michigan citizenry. An "interest so generalized will not support a claim for intervention as of right." *Miller*, 103 F.3d at 1246 (quoting and citing with approval *Athens Lumber Co. v. Federal Election Comm'n*, 690 F.2d 1364 (11th Cir. 1982)). Thus, the MCRI's and the ACRF's cognizable legal interests extend only to suits challenging the legislative process by which Proposal 2 was approved. At this point, the MCRI's and the ACRF's interest in the underlying litigation "simply pertains to the enforceability of (Proposal 2] in general, which we do not believe to be cognizable as a substantial legal interest sufficient to require intervention as of right."[2]

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[2] The dissent attempts to differentiate a citizen-initiated legislative enactment from a citizen-initiated amendment to a state's constitution, arguing that a public interest group may have

(continued...)

Northland Family Planning, 487 F.3d at 346. As we aptly explained in *Northland Family Planning*, "[w]ithout these sorts of limitations of the legal interest required for intervention, Rule 24 would be abused as a mechanism for the over-politicization of the judicial process." *Id.*

The MCRI and the ACRF point out, however, that in Grutter we reversed a district court's denial of intervention as of right to the Citizens for Affirmative Action's Preservation ("CAAP"), "a nonprofit organization whose stated mission was to preserve the opportunities in higher education for African-American and Latino/a students in Michigan." 188 F.3d at 397. In *Grutter*, we held that CAAP had a substantial legal interest in a lawsuit challenging the constitutionality of the University of Michigan's race-conscience admissions policy. *Id.* at 398-99. The MCRI and the ACRF contend that CAAP, like them, had only an ideological interest in the lawsuit, and because CAAP was granted intervention as of right, they should be too.

The MCRI and the ACRF misidentify CAAP's interest in Grutter. Although CAAP certainly had a

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[2] (...continued)
a substantial legal interest in the latter's enforcement. Dissent Op. at 3-4. We are not persuaded by this razor-thin distinction. Regardless how a law came into being, the government is, for the most part, entrusted with enforcing it. Thus, as we stated in *Northland Family Planning*, the public's legal interest does not extend to suits challenging the enforceability of an already-enacted law. 487 F.3d at 345. So, where, as here, a public interest group has only an ideological stake in the litigation, it too cannot be said to have a substantial legal interest in the law's enforcement.

general ideological aversion to the elimination of the University of Michigan's race-conscience admissions policy, its members were also directly affected by the challenged policy. At the time of the litigation, CAAP was a coalition consisting of minority students and civil-rights groups, among others, premised on preserving affirmative action in higher education. Indeed, consistent with the makeup of its members, the district court treated CAAP's interests as identical to the proposed minority-student intervenors in that lawsuit, who, like Eric Russell, no doubt had a substantial legal interest in the litigation. *See Gratz v. Bollinger*, 183 F.R.D. 209, 212 n.4 (E,D. Mich. 1998), *rev'd by Grutter*, 188 F.3d 394 ("[I]t would appear that the proposed student intervenors and [CAAP] share the same interest in the preservation of race as a factor in determining admissions. . . , [T]he Court will discuss the interests of both groups together." (internal citation and quotation marks omitted)). Moreover, CAAP was clear in its intervention motion that its members would be directly affected by the outcome of the litigation. *See id.* ("CAAP asserts that its membership consists of individuals, some of whom are parents or grandparents of prospective African-American and Latino students in the State of Michigan."). Consistent with this, in *Grutter*, we held that CAAP, by virtue of its minority members, "enunciated a specific interest in the subject matter of th[e] case, namely [its] interest in gaining admission to the University of Michigan. . . ." 188 F.3d at 399. Here, the MCRI and the ACRF have made no such specific "enunciation."

Thus, we hold that the MCRI and the ACRF lack a substantial legal interest in the outcome of this case

and affirm the district court's denial of their joint motion to intervene as of right. Accordingly, as mentioned, we need not address the remaining intervention-as-of--right elements.

b. *TAFM*

TAFM's contention that it is entitled to intervene as of right is even less compelling. We have little trouble concluding that TAFM is without a substantial legal interest in the outcome of this case. TAFM took no position in favor or against Proposal 2 before, during, or after the November 2006 election, and instead sought only to "promote an educated decision on the question by Michigan citizens through civil and informed discourse." By all accounts, neither TAFM nor its members are regulated by the challenged constitutional amendment. At best, TAFM has only an ideological interest in seeing that Proposal 2 is enforced. As discussed above, consistent with our holding in *Northland Family Planning*, this alone does not constitute a substantial legal interest. *See* 487 F.3d at 346. Therefore, the district court also properly denied TAFM's motion to intervene as of right.

B. Permissive Intervention

Under Rule 24(b) of the Federal Rules of Civil Procedure, a district court may grant intervention to certain interested parties:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in

> common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). "The denial of permissive intervention should be reversed only for clear abuse of discretion by the trial judge." *Purnell*, 925 F.2d at 951 (citing *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161 (6th Cir.1987)).

In denying the proposed intervenors permissive intervention, the district court explained that, "in cases of this importance, [the district courts] are mere way stations on the judicial road to resolution by courts beyond," and that granting intervention to the proposed intervenors "will inhibit, not promote, a prompt resolution . . . ." *Coal. to Defend Affirmative Action*, slip op. at 16. The district court expressed further concern that the proposed intervenors would "seek to file more claims, amend pleadings even further, and inject issues that may not lead directly to a resolution of the issues circumscribed by the present pleadings." *Id.* This, coupled with the district court's conclusions that the proposed intervenors lacked a substantial legal interest in the lawsuit, and that the proposed intervenors were adequately represented by existing parties, was a sufficient analysis of the relevant criteria required by Rule 24(b). We cannot say that we are "left with a definite and firm conviction," *Paschal*, 295 F.3d at 576, that the district court acted outside its discretion when it denied permissive intervention to the MCRI, the ACRF, and TAFM. *Cf. Miller*, 103 F.3d at 1248 ("[The district

court must] provide enough of an explanation for its decision to enable this court to conduct meaningful review. It is insufficient merely to quote the rule and to state the result.").

III. CONCLUSION

For these reasons, we **AFFIRM**.

CONCURRING IN PART, DISSENTING IN PART

KENNEDY, Circuit Judge, concurring in part and dissenting in part. I concur with the majority's disposition with regard to appellant TAFM. I cannot, however, agree that *Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007), "compels us to hold that the MCRI's and the ACRF's status . . . is insufficient to provide them with a substantial legal interest" in this case. Maj. Op., *ante* at 6. The majority relies on that opinion to avoid clear prior holdings from both our circuit and the Ninth Circuit (whose holdings we had previously adopted). Therefore, because I conclude that MCRI and ACRF have a substantial legal interest (and easily meet the other Rule 24(a) factors), I dissent.

I. Substantial Legal Interest

The majority relies almost solely on *Northland Family Planning*; indeed, it concludes that case "compels" its holding here. Maj. Op. at 6. *Northland Family Planning* is distinguishable because (1) the challenged state law in that case was enacted by the legislature, rather than by the citizens through constitutional amendment as here, and (2) the groups here have raised reasons why they cannot rely on the office of the Michigan Attorney General to vigorously advocate the constitutionality of Proposal 2.

At the outset, however, I would note that the majority can only rely on *Northland Family Planning* because that case fundamentally altered the Rule 24(a) landscape. Prior precedent was consistent in holding that "interest" was to be construed liberally and "close cases should be resolved in favor of recognizing an interest under Rule 24(a)." *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1245, 1247 (6th Cir. 1997). While *Northland Family Planning* carefully distinguished our and some of the Ninth Circuit's prior holdings or their facts, it ignored the basis for those holdings.[3]

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[3] In addition, the intervention discussion may well be dicta. The district court in *Northland Family Planning* denied the State of Michigan's motion to dismiss and ruled that the state statute was unconstitutional. In the same order, it denied the public interest group's motion to intervene as a defendant. We affirmed the ruling that the statute was unconstitutional, granting summary judgment to the plaintiffs. We also noted that, "[t]he finality of the summary judgment decision clearly has potential to render moot [the group's] motion to intervene" 487 F.3d at 344. Nonetheless, we addressed the question. Because the grant of

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In *Miller* we cited with approval a Ninth Circuit rule that "a public interest group that is involved in the process leading to adoption of legislation has a cognizable interest in defending that legislation." *Id.* That rule found its genesis in a case that cannot be distinguished from *Northland Family Planning.* In *Washington State Bldg. and Const. Trades Council, AFL-CIO v. Spellman*, a voter approved initiative "prohibit[ed] the transportation and storage within [the state] of radioactive waste produced outside the state." 684 F.2d 627, 629 (9th Cir. 1982). The legislature of the state subsequently enacted legislation pursuant to the initiative. In a lawsuit against the state challenging the constitutionality of the statute, the citizen-group sponsor of the legislation moved to intervene, but the district court denied its motion. The Ninth Circuit reversed the district court and held that the appellant, "as the public interest group that sponsored the initiative, was entitled to intervention as a matter of right under Rule 24(a)." *Id.* at 630. The public interest group was not regulated by the initiative, which the majority concludes is critical here, Maj. Op. *ante* at 6-7, nor was it involved in serial litigation concerning the initiative, which *Northland Family Planning* found was important in *Miller.* 487 F.3d at 344-45. Nonetheless, and despite consistent citation with approval to the line of Ninth

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[3] (...continued)
summary judgment to plaintiffs ended the case on the merits, there was no need to determine whether the public interest group had the right to intervene. For this reason, future panels may reject the Rule 24(a) discussion in *Northland Family Planning.* Indeed, without that foundation, the decided break with prior precedent may very well convince subsequent panels to conclude that this case too is anomalous, and they need not follow it when reflecting on the body of Rule 24(a) case law in this circuit.

Circuit cases beginning with *Spellman*, a panel of this court reached the opposite conclusion in *Northland Family Planning*.

There are good reasons to conclude, however, that the sponsors of a constitutional amendment, like Proposal 2 in this case, have a greater interest in defending the measure than the group that sought to intervene in *Northland Family Planning*.[4] There we noted that "in a challenge to the constitutionality of an already enacted statute . . . the public interest in its enforceability is entrusted for the most part to the government, and the public's legal interest in the *legislative* process becomes less relevant." 487 F.3d at 345 (emphasis mine). That insight rests on a simple

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[4] An elaboration of the facts of *Northland Family Planning* and the Michigan initiative and constitutional amendment procedures is in order: In Michigan, a group can propose laws to the legislature through an initiative.

> To invoke the initiative . . . petitions signed by a number of registered electors, not less than eight percent . . . of the total vote cast for all candidates for governor at the last preceding general election at which a governor was elected shall be required . . . . Any law proposed by initiative petition shall be either enacted or rejected by the legislature without change or amendment . . . . If any law so proposed is not enacted by the legislature within 40 days, [it] shall [be] submit[ted] to the people for approval or rejection at the next general election.

Mich. Const. Art. II § 9. In *Northland Family Planning*, the proposed intervenor had proposed the challenged law to the legislature through an initiative and the legislature had enacted the law. In contrast, in the instant case, a majority Michigan voters approved an amendment to the Michigan Constitution in a general election pursuant to Mich. Const. Art. 12 § 2.

presumption: When the government has passed a law, it can be trusted to administer it. When, as here, however, government did *not* pass the law, but rather the citizens of the state amended their constitution in a general election (arguably because their elected officials would not accede to their will), that presumption does not arise.

The procedural history of this case confirms that the plaintiffs have a basis for their fear that the office of the Attorney General cannot be relied on to defend "the public interest in [this amendment's] enforceability." *Id.* As the majority notes, the Attorney General and the Governor have already compromised with the plaintiffs and the cross-claimants in this case and stipulated to an injunction that, we have previously found, had no basis in federal law. Maj. Op. *ante* at 3-4; *Coalition v. Granholm*, 473 F.3d 237, 244-247 (6th Cir. 2006). In addition the "government" in this case is divided; prior to the 2006 general election, the Attorney General publicly supported Proposal 2 and the Governor opposed it. Therefore, while the Attorney General takes the view in his filings that the amendment does not violate the federal Constitution, the Governor has indicated a possibility that she might conclude otherwise. Indeed, although she was sued in her official capacity only, she has requested that the Attorney General put a conflict wall in place in his office to ensure that her position is represented in federal court without the influence of the Attorney General. Governor's Br. at 4-5, No. 06-2656. The Governor and the Attorney General have both filed answers in the district court and, by all appearances, intend to litigate the matter separately.

Therefore, the State of Michigan (the only appropriate defendant in an action to declare a measure adopted in a general election unconstitutional) does not appear to be a party in this case. Instead, Attorney General Cox and Governor Granholm are both either named defendants or, in the case of Attorney General Cox, an intervening defendant because they have recognized potential for conflicting views (and thus different litigation strategies) between them. It is also unclear what the status of Governor Granholm, as a party, actually is. After Attorney General Cox intervened, she should no longer have been in the case, yet she has continued to file briefs here in support of the denial of intervention, as well as pleadings and briefs in the court below.

All of this reinforces concern with entrusting the "public interest in enforceability" of a general election, voter-approved measure to elected officials. As the example of the Governor proves, there are cases in which the elected officials of a state will disagree with the majority of the voting population on a particular point of public policy. Therefore, when the voters demonstrate their preference on that point of public policy through the constitutional amendment process, it follows that some representative of the voters has a "substantial interest" in defending that position: I agree with the Ninth Circuit's conclusion in *Spellman* that the sponsor of the measure should be that representative.

The point, therefore, is simply that measures approved by the voting public in a general election are different from legislative acts. This point does not depend on the policy preferences of particular elected

officials. Rather, the possibility of conflict creates a substantial interest. It does not matter in the substantial interest inquiry that the Attorney General supported Proposal 2 before the election. That fact will be weighed in consideration of the last factor, namely whether a party already in the case will sufficiently represent the position of the proposed intervenor. I turn to that factor, as well as the other remaining ones, presently.

II. Remaining factors

Because it concludes that MCRI and ACRF do not have a substantial legal interest in this case, the majority does not address the remaining factors. I would find, however, that (1) the district court abused its discretion when it determined that the motion to intervene was not timely, (2) the ability of MCRI and ACRF to protect its substantial legal interest may be impaired in the absence of intervention, and (3) that the Attorney General, as well as the other parties in the case, might not adequately represent that interest.

First, the parties' motion to intervene was timely. While it is true that appellants must have known about the litigation shortly after it was filed, it is equally clear that the litigation had not progressed by the time they moved to intervene. "The absolute measure of time between the filing of the complaint and the motion to intervene is one of the least important . . . circumstances" to consider. *Stupak-Thrall v. Glickman*, 226 F.3d 467, 475 (6th Cir. 2000). The Attorney General stated in his motion to intervene, filed the very same day as appellants' and found to be timely, that "intervention will in no way

unduly delay or prejudice the adjudication of the rights of the original parties since this suit is in its initial phase." Attorney General's Mot. Interv. ¶ 17. Appellants waited only a week after service on the Governor and only one day after notice of that service was filed in the district court before filing their motion. No discovery had occurred and no orders had issued. None of the traditional hallmarks of a progressing litigation yet existed.

Second, to dispose of the present case without allowing the intervention of the MCRI and ACRF would compromise their ability to protect their interests, as an adverse ruling would threaten the viability of the constitutional amendment that these groups supported. To satisfy this element, "a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied[,]" a "burden [that] is minimal." *Miller*, 103 F.3d at 1247 (citing *Purnell u City of Akron*, 925 F.2d 941, 948 (6th Cir. 1991)) (emphasis mine). As such, the appellants' showing that an adverse determination in this case has the potential to hinder their ability to protect their interest in eliminating race-based preferences is sufficient to support intervention.

Third, the Attorney General *might* not adequately represent the appellants' interest in this matter. The threshold for this requirement is again low; appellants need not show that representation *won't* be inadequate, only that the *potential* exists that the Attorney General will not make all of their arguments. *Grutter v. Bollinger*, 188 F.3d 394, 400 (6th Cir. 1999); *Sagebrush Rebellion, Inc, v. Watt*, 713 F.2d 525, 528

(9th Cir. 1983). The procedural history of this case indicates that this potentiality exists. While the opponents of the motion have argued that the stipulated injunction was merely a litigation strategy rather than a different theory of the case, the fact that this court overturned the stipulated injunction on appeal indicates that a more zealous litigation approach could significantly alter the enforcement and ultimately the interpretation of this constitutional amendment. In addition, the conflict wall set up across the Attorney General's office at the request of the Governor further indicates that different interpretations of this provision and its interaction with federal constitutional and statutory law are possible; the appellants' interpretation could be more expansive than that of the existing parties.

* * *

In order to ensure vigorous advocacy so that we do not intrude on states' interests in the constitutionality of their own laws, I would hold that sponsors of voter initiatives may intervene as of right to defend the measures they sponsored. Therefore, I would reverse the district court with regard to appellants MCRI and ACRF and remand with instructions to allow those parties to intervene pursuant to Rule 24(a).

Appendix B–1

Case 2:06-cv-15024.DML.RSW Document 55
Filed 12/27/2006

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

COALITION TO DEFEND AFFIRMATIVE ACTION, INTEGRATION AND IMMIGRATION RIGHTS AND FIGHT FOR EQUALITY BY ANY MEANS NECESSARY (BAMN), UNITED FOR EQUALITY AND AFFIRMATIVE ACTION LEGAL DEFENSE FUND, RAINBOW PUSH COALITION, CALVIN JEVON COCHRAN, LASHELLE BENJAMIN, BEAUTIE MITCHELL, DENESHA RICHEY, STASIA BROWN, MICHAEL GIBSON, CHRISTOPHER SUITON, LAQUAY JOHNSON, TURQOISE WISE-KING, BRANDON FLANNIGAN, JOSIE HUMAN, ISSAMAR CAMACHO, KAHLEIF HENRY, SHANAE TATUM, MARICRUZ LOPEZ, ALEJANDRA CRUZ, ADARENE HOAG, CANDICE YOUNG, TRISTAN TAYLOR, WILLIAMS FRAZIER, JERELL ERVES, MATTHEW GRIFFITH, LACRISSA BEVERLY, D'SHAWNM FEATHERSTONE, DANIELLE NELSON, JULIUS CARTER, KEVIN SMITH, KYLE

Case No. 06-15024

Hon. David M. Lawson

OPINION AND ORDER GRANTING MOTIONS TO EXPEDITE GRANTING IN PART AND DENYING IN PART MOTIONS TO INTERVENE AND STRIKING MOTION TO DISMISS

SMITH, PARIS BUTLER, TOUISSANT KING, AIANA SCOTT, ALLEN VONOU, RANDIAH GREEN, BRITTANY JONES, COURTNEY DRAKE, DANTE DIXON, JOSEPH HENRY REED, AFSCME LOCAL 207, AFSCME LOCAL 214, AFSCME LOCAL 312, AFSCME LOCAL 836, AFSCME LOCAL 1642, AFSCME LOCAL 2920, and the DEFEND AFFIRMATIVE ACTION PARTY,

Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan, the REGENTS OF THE UNIVERSITY OF MICHIGAN, the BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY, the BOARD OF GOVERNORS OF WAYNE STATE UNIVERSITY, and the TRUSTEES of any other public college or university, community college, or school district,

Defendants,

and

REGENTS OF THE UNIVERSITY OF MICHIGAN, THE BOARD OF TRUSTEES OF MICHIGAN STATE UNIVERSITY and the BOARD OF GOVERNORS OF WAYNE STATE

UNIVERSITY,

Cross-Plaintiffs,

v.

JENNIFER GRANHOLM, in her official capacity as Governor of the State of Michigan,

Cross-Defendant.

OPINION AND ORDER GRANTING MOTIONS TO EXPEDITE, GRANTING MOTION TO INTERVENE BY ERIC RUSSELL, DENYING REMAINING MOTIONS TO INTERVENE, AND STRIKING MOTION TO DISMISS FILED BY THE AMERICAN CIVIL RIGHTS FOUNDATION AND THE MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE

Before the Court are three motions by various parties to intervene in this action either as plaintiffs or defendants. This case was commenced on November 8, 2006 by several plaintiffs as a challenge to a recently-approved state constitutional amendment, Proposal 06-2, now known as Article 1, section 26 of the Michigan Constitution of 1963, that purports to bar the use of race, sex, color, ethnicity, or national origin to promote diversity in public hiring, contracting, and university admission decisions. The plaintiffs allege that the amendment violates the United States Constitution. The Court has reviewed the submissions of the parties and finds that the relevant law and facts have been set forth in the motion papers and that oral argument will not aid in the disposition of the motion. Further, the parties have sought expedited treatment

of their motions, and oral argument is impractical in light of that request. Accordingly, it is ORDERED that the motion be decided on the papers submitted. See E.D. Mich. LR 7.1 (e)(2). The Court finds that the interests of the proposed intervenors, save those of Eric Russell, are represented adequately by the parties presently before the Court, allowing intervention would interfere with the expeditious disposition of the present action, and therefore intervention is not in the interest of justice. Proposed intervenor Russell, however, has identified an individual interest that may not be represented adequately by the institutional parties now before the Court, and therefore his motion to intervene will be granted.

1.

A.

Although the lawsuit's filing the day after the election received some press coverage, there was little activity in the case for over a month after it was filed. Then on December 11, 2006, the three University defendants filed a cross-claim against co-defendant Governor Jennifer Granholm seeking declaratory relief, together with a motion for a preliminary injunction to delay the implementation of the state constitutional amendment until the current enrollment season is completed, and a motion for expedited consideration. The Court ordered responses to the motion for injunction by December 18, 2006. Thereafter, the Michigan Attorney General sought permission to intervene as a defendant in the matter, together with a motion to expedite consideration of the motion to intervene. The parties to the case either took no position or consented to the relief, and the Court granted the motion to intervene on December 14,2006.

On December 18, 2006, the Court received a stipulation [dkt #26] from all parties to the case, including intervening defendant Michigan Attorney General, consenting to the temporary injunctive relief sought by the cross-claimants (the University defendants), and agreeing to dismiss with prejudice the portion of the cross-claim seeking a temporary injunction, and the balance of the cross-claim without prejudice. The Court approved the stipulation and entered an appropriate order on December 19, 2006.

Also on December 14,2006, a motion to intervene was filed by the American Civil Rights .Foundation and the Michigan Civil Rights Initiative Committee. The American Civil Rights Foundation appears to be a California-based organization and represents that it is a coalition of individuals who are opposed to the use of racial, gender, and ethnic factors by government in making decisions about letting contracts, education, and employment. The Michigan Civil Rights. Initiative Committee is the ballot question committee that sponsored the challenged ballot proposal. These two groups seek to intervene as defendants in the action. Along with their motion to intervene, they filed a motion to dismiss the complaint, but the plaintiffs filed an amended complaint on December 17,2006. They filed no motion for immediate consideration at that time.

On December 18, 2006, a motion to intervene as defendants was filed by a group called Toward a Fair Michigan, and an individual named Eric Russell. The mission of Toward a Fair Michigan, according to the affidavit of its chairperson, is to "promot[e] and foster[] balanced debate" on the ballot proposal, and "insure that the deliberate will of the people" is enforced. Aff.

of William Allen at ¶ 1. Eric Russell states that he is a Michigan citizen who intends to apply to law school at the University of Michigan next year.

Also on December 18, 2006, the City of Lansing filed a motion to intervene as plaintiff in the action. The City seeks a delay in the effective date of the constitutional amendment as to it because, it contends, it must work within the framework of certain municipal ordinances that mandate the use of racial and gender preferences in employment and letting contracts. The next day, Lansing filed a supplemental emergency motion to intervene in which it asks that it be allowed the benefit of the stipulation reached by the parties to the case with respect to the delay of the effective date of the constitutional amendment as to the University defendants' admission programs.

The American Civil Rights Foundation and Toward a Fair Michigan filed their motions to expedite the hearings on their intervention motions on December 19, 2006. They both make reference to the (now dismissed) cross-claim filed by the University defendants and the "additional filings" in the case as grounds for expedited consideration.

B.

The main thrust of the motions to intervene filed by the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, Toward a Fair Michigan, and Eric Russell is that some of the named defendants have evidenced through public statements their opposition to Proposal 2 or have otherwise demonstrated they will not vigorously defend its constitutionality. These contentions are focused on the Michigan Governor and the University

defendants, since the motions were filed presumably without the benefit of learning that the Michigan Attorney General, who publicly supported the proposal during the election, was allowed to intervene in the case. The City of Lansing seeks intervention as a plaintiff based on its "substantial interest in preserving its legislatively mandated purchasing and hiring ordinances and civil rights policies and procedures." Br. in Supp. of Mot. to Intervene at 7. Lansing's main goal is obtaining additional time to comply with the amendment's provisions.

The American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee argue that their request is timely even though it comes after the cross-claim by the University defendants was resolved and dismissed, they have a substantial interest in the subject matter of the lawsuit because of their activity in promoting passage of the proposal, their interest in ending affirmative action would be impaired if Proposal 2 were invalidated or narrowly interpreted, and the other parties could not represent their interests because those interests are inconsistent with the defendants' pre-election pronouncements about the ballot proposal.

The University defendants and the Governor respond with the arguments that the intervention request is untimely because the cross-claim has been resolved and the proposed intervenors failed to ask for expedited treatment of their motion despite the time-sensitive nature of the cross-claim. They also argue that the proposed intervenors failed to demonstrate a substantial interest in the litigation that is different than any voter who supported the proposal. They next contend that with the entree of the

Michigan Attorney General into the case, a full range of arguments addressing all the relevant issues will be presented to the Court, particularly in light of the attorney general's pledge to vigorously defend the amendment. Finally, the Governor asserts that the Court should view with skepticism the Michigan Civil Rights Initiative Committee's request to intervene because of the misconduct its members were found to have committed by the deception of Michigan citizens in obtaining the requisite number of signatures in support of Proposal 2 as described in *Operation King's Dream v. Connerly*, 2006 WL 2514115 (B.D. Mich. 2006). The Michigan Attorney General did not respond to the intervention motion by the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee.

In their motion to intervene, Toward a Fair Michigan and Eric Russell likewise contend that their request is timely. Russell says that he has an interest in the subject matter of the litigation because he is a white male seeking admission to the University of Michigan Law School next fall. The interest of Toward a Fair Michigan is less concrete; it asserts that it did not take a position concerning whether Proposal 2 should be passed, and its objective was to educate the public and see that the will of the electorate, whatever its decision, was implemented. Russell also argues that his interest in achieving admission to the University of Michigan would be impaired if Proposal 2 is struck down or narrowly construed, and Toward a Fair Michigan argues that its interests will be impaired if the will of the people is not upheld. These proposed intervenors also contend that their interests will not be represented adequately by the present parties based on

the Governor's pre-election statements in opposition to the proposal.

The University defendants and the Governor have repeated their responses in opposition to the intervention motions filed by Toward a Fair Michigan and Russell. The Michigan Attorney General did not respond to the intervention motion filed by these proposed intervenors.

The City of Lansing argues that its motion for intervention is timely because it filed the present motion promptly after discovery of its interest in the litigation. In identifying its interest in the subject matter of the present lawsuit, Lansing asserts that like the plaintiffs who seek to overturn Proposal 2, Lansing "has a similar interest not necessarily in overturning Proposal 2, but at least in delaying its implementation." Br. in Supp. of Mot. to Intervene at 7. Lansing also contends that disposition of the case may, as a practical matter, impair Lansing's interest because an adverse decision would defeat Lansing's efforts to achieve race and gender equality through local legislation. Finally, Lansing asserts that its interests are not adequately represented because none of the current parties will represent the interests and concerns of local governments effected by Proposal 2.

The Michigan Attorney General opposes Lansing's request to intervene primarily on the ground that Lansing has failed to establish that its interests will be inadequately represented by the current parties to the case. The attorney general insists that the movant has the burden of establishing inadequacy of representation, and this burden includes overcoming the presumption of adequacy of representation when the proposed intervenor and a party to the suit share

the same ultimate objective. The University defendants and the Governor did not respond to the intervention motion filed by the City of Lansing.

All movants also have sought permissive intervention as an alternative form of relief.

II.

Motions to intervene are governed by Federal Rule of Civil Procedure 24. Rule 24 allows two types of intervention: intervention by right and permissive intervention. With respect to both types of intervention, the Sixth Circuit has held that although "Rule 24 should be 'broadly construed in favor of potential intervenors,'" the court has cautioned that "this does not mean that Rule 24 poses no barrier to intervention at all." *Stupak-Thrall v. Glickman*, 226 F.3d 467, 472 (6th Cir. 2000) (quoting *Purnell v. Akron*, 925 F.2d 941, 950 (6th Cir. 1991)). The court has affirmed the denial of motions to intervene by right and permissively for a variety of reasons. *See, e.g., Jordan v. Michigan Conf. of Teamsters Welfare Fund*, 207 F.3d 854,863 (6th Cir. 2000) (affirming denial of a motion to intervene as of right, because the motion was untimely and the proposed intervenor's interests were adequately represented); *Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987) (affirming denial of motions to intervene permissively and as of right, in part because "the district court has already taken steps to protect the proposed intervenors' interests by inviting [their counsel] to appear as amicus curiae in the case").

A.

Rule 24(a), dealing with intervention of right, states:

> Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a). "[T]o intervene as of right under Rule 24(a)(2), a proposed intervenor must establish the following four elements: (1) the motion to intervene is timely; (2) the proposed intervenor has a substantial legal interest in the subject matter of the case; (3) the proposed intervenor's ability to protect that interest may be impaired in the absence of intervention; and (4) the parties already before the court may not adequately represent the proposed intervenor's interest." *United States v. Michigan*, 424 F.3d 438, 443 (6th Cir. 2005). "Failure to meet [any] one of the [four] criteria will require that the motion to intervene be denied." *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989).

The first element—timeliness—"should be evaluated in the context of all relevant circumstances." *Stupak-Thrall*, 226 F.3d at 472 (internal quotation marks omitted). A variety of factors are usually considered, including the developments in the case, the purpose for intervention, and how long the proposed intervenors knew of their interest in the property or transaction at issue before they sought permission to intervene. *Id.* at 473-74. In this case, the lawsuit challenges the implementation of a state constitutional

amendment that was to go into effect on December 23, 2006. None of the parties save Russell has offered an explanation why they waited for over a month to join the suit. Russell's individual interest became apparent when the University defendants sought a delay in the effective date of the state constitutional amendment and reached an agreement to that effect with others in the lawsuit. Since Russell's own admission prospects may be affected by that agreement, it was sensible for him to seek intervention when that information came to light. The other proposed intervening defendants, however, have interests that are no different than any Michigan citizen who voted in favor of the ballot proposal, and there was no obstacle to their taking action shortly after the lawsuit was filed and well in advance of the effective date of the amendment. Similarly, the City of Lansing no doubt was aware of the pending litigation and the effective date of the amendment, but it chose to wait for over a month before seeking an entree into the case. The Court believes that the citizens of the State are best served by a prompt resolution of the issues framed by the pleadings as to the constitutionality of their new state constitutional provision, and the delay in reaching that objective occasioned by the tardy requests to intervene, in light of all the circumstances of the case, renders the requests (save Russell's) untimely.

The second element—that the proposed intervenor proves a substantial legal interest in the property or transaction involved in the lawsuit—was addressed by the Sixth Circuit in *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240 (6th Cir. 1997), which the court denominated a "close case." There, the court of appeals wrote:

> This circuit has opted for a rather expansive notion of the interest sufficient to invoke intervention of right. *See Purnell*, 925 F.2d at 948; *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("[T]his court has acknowledged that 'interest' is to be construed liberally."). We have, for example, noted that an intervenor need not have the same standing necessary to initiate a lawsuit, *Purnell*, 925 F.2d at 948, and cited with approval decisions of other courts "reject[ing] the notion that Rule 24(a)(2) requires a specific legal or equitable interest." *Id.* . . . The inquiry into the substantiality of the claimed interest is necessarily fact-specific.

Id. at 1245. The court in *Miller* held that the Michigan Chamber of Commerce had a sufficient legal interest in a suit challenging an amendment to Michigan's Campaign Finance Act not only due to its role in the political process that resulted in the adoption of the disputed amendment, but also by the fact that it was also specifically regulated by the legislation. *See id.* at 1247. Further guidance is provided by *Grutter v. Bollinger*, 188 F.3d 394 (6th Cir. 1999), where the court held that pro-affirmative action groups and minority applicants to the University of Michigan's undergraduate and law programs had a sufficient interest to justify intervention in a suit challenging the university's race-conscious admission programs because, if the lawsuit was successful and the affirmative-action programs eliminated, they would have a lesser chance of gaining admission. *See id.* at 400.

In this case, the American Civil Rights Foundation and the Michigan Civil Rights Initiative Committee argue that they were integrally involved in the drafting and promotion of Proposal 2. It would not be unreasonable to posit that the amendment would not have reached the ballot without their efforts. Therefore, although under *Miller*, the question of whether these organizations have a sufficient interest in the outcome of this litigation is perhaps a close one. However, involvement in the pre-election activity does not automatically establish a substantial interest in this litigation, as these proposed intervenors contend. *Miller* does not stand for the proposition that an organization that supports legislation *ipso facto* has a substantial legal interest in the outcome of a suit challenging such legislation. Rather, the court found a substantial interest where the Chamber of Commerce in that case was not a mere supporter of the legislation; it was also directly "regulated by at least three of the four statutory provisions challenged by the plaintiffs." 103 F.3d at 1247. There is no suggestion that either of these organizations will be affected by rulings concerning the amendment at issue in this case. They have not asserted that whatever ruling this Court hands down will have an impact on the vitality of the organizations, subject them to regulation, or expand or curtail their rights as organizations. They have not proved, therefore, that they have an "interest relating to the property or transaction which is the subject of the action." Fed. R. Civ. P. 24(a).

The interest of Toward a Fair Michigan is even more tenuous. It has represented that it took *no* pre-election position of whether the proposal should pass, but it only sponsored debates about the merits of the ballot initiative. It states that its present mission

is to ensure that public officials carry out the will of the electorate and advise people of their rights under the new amendment. Toward a Fair Michigan has not identified any interest in its brief that would be impacted by a ruling of the Court.

The City of Lansing primarily seeks a delay in the application of the constitutional amendment to itself. It has argued that it is subject to regulation by the new law, and its impact will materially affect the operations of the City in its hiring and contract-letting decisions. Lansing has established a substantial interest in the litigation under *Miller*.

Likewise, Eric Russell is situated similarly to the intervenors in *Grutter v. Bollinger*, in that if the present plaintiffs are successful in obtaining a ruling that the constitutional amendment is invalid, Russell's chances of gaining admission to the University of Michigan law school may be diminished. *See Grutter*, 188 F.3d at 400.

Proof of the third element—that the proposed intervenor's ability to protect its interest may be impaired in the absence of intervention—is not an onerous task. "'To satisfy this element of the intervention test, a would-be intervenor must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal.'" *Grutter*, 188 F.3d at 399 (quoting *Miller*, 103 F.3d at 1247). Of course, the inability to protect one's interest posits the existence of an interest to begin with. The American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, and Toward a Fair Michigan have failed in that proof. Eric Russell and the City of Lansing have not.

The fourth element requires the proposed intervenor to prove the inadequacy of representation by others who are in the case, and it appears to be the most critical issue with respect to the present motions to intervene. In *Michigan*, the Sixth Circuit explained that

> [a]pplicants for intervention bear the burden of proving that they are inadequately represented by a party to the suit. *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). This burden has been described as minimal because it need only be shown 'that there is a potential for inadequate representation.' *Grutter*, 188 F.3d at 400. Nevertheless, applicants for intervention must overcome the presumption of adequate representation that arises when they share the same ultimate objective as a party to the suit. *Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987).

United States v. Michigan, 424 F.3d at 443-44. In *Grutter*, the courts of appeals held that the burden of proof concerning inadequacy of representation remains the same when the existing party (the putative representative of the proposed intervenor's interests) is a governmental entity. *Grutter*, 188 F.3d at 400. To meet this burden, "[i]t may be enough to show that the existing party who purports to seek the same outcome may not make all of the prospective intervenor's arguments." *Ibid.* (internal quotation marks omitted).

The main argument by the proposed intervening defendants on the adequacy of representation is that the original parties to the lawsuit all had been opposed to the ballot proposal before the election. That

argument certainly had some force before the Michigan Attorney General was allowed to intervene in the case. There is evidence showing that Governor Granholm made public statements calling for the rejection of Proposal 2 prior to election day and lamenting its subsequent passage. The University defendants plainly oppose Proposal 2 as evidenced by their cross-claim in this action contesting the constitutionality of the amendment and seeking the delay of its implementation. However, the Michigan Attorney General took a pre-election position in support of Proposal 2 and urged its passage. The Attorney General's office has taken pains to divide its sections representing the Governor and its own interests and has isolated the two divisions. For his own part, the assistant attorneys general assigned to represent the General's own interests have averred that the Michigan Attorney General will "ensure that the Court is presented with a full range of arguments . . . so that a vigorous defense of the constitutionality of [Proposal 2] may be had." Mot. to Expedite Mot. to Intervene by Attorney General at ¶ 9.

The proposed intervening defendants have challenged the attorney general's ability to represent their interests by arguing that, no matter how well the attorney general may represent the electorate, it is doubtful that he will be able to represent the specific interests of the sponsors and drafters of Proposal 2. This argument is as imprecise as it sounds, but the theory essentially appears to be that the attorney general will not defend Proposal 2 with as much fervor as the proposed intervenors would. However, the "interest" of the proposed intervenors in seeing the constitutional amendment upheld is no different than the majority of Michigan citizens who voted for its

passage. There is no proof in this record that the proposed intervenors or their lawyers would be more capable than the elected attorney general of mounting a defense to the amendment, or that their arguments would be more compelling or credible or better founded. Since the interests of proposed intervenors the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, and Toward a Fair Michigan are precisely aligned with those of the Michigan Attorney General, and because there is little likelihood that their participation would shed any new light on the issues presented, they have not shown that the present parties, as they are now aligned, would be inadequate to advance their interests.

Similarly, the City of Lansing has not made a convincing argument that its interests are not well-represented. The named plaintiffs oppose Proposal 2, the Universities largely oppose Proposal 2, and Governor Granholm has publicly displayed her disagreement with the amendment. The current parties to the suit—private organizations, a variety of individuals, and labor unions—seem to be interested in the amendment's impact on education, employment, and public contracts. Under these circumstances, the Court finds that Lansing's interests appear to be adequately represented.

The circumstances of Eric Russell are different. Russell is the only intervenor who has alleged an individual interest that may not be taken into account by the present parties. He has alleged a personal stake in seeing that his law school admission chances are not diminished by a narrow construction or invalidation of the amendment. His interest extends beyond those of

the citizens and election groups that promoted or opposed the ballot proposal. He seeks the implementation of Proposal 2 now, while his application is being processed. The other parties do not represent that position. Russell, therefore, has established the fourth element for intervention by right.

The Court finds that none of the proposed intervenors except Eric Russell have made the proper showing to establish a right to intervene in this case under Rule 24(a).

B.

Rule 24 also sets out the standard for permissive intervention. It states:

> Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Fed. R. Civ. P. 24(b). An applicant for permissive intervention, therefore, must prove that the motion for intervention is timely, there is at least one common question of law or fact, and the balancing of undue delay, prejudice to the original parties, and any other relevant factors favors intervention. *Michigan State AFL-CIO v. Miller*, 103 F.3d 1240, 1248 (6th Cir. 1997).

The Court has found that the motions to intervene by the American Civil Rights Foundation, the Michigan Civil Rights Initiative Committee, Toward a Fair Michigan, and the City of Lansing are not timely. Moreover, it is paramount that the issues in this case are resolved promptly. Michigan's public institutions will serve its citizens best when they have a clear understanding of the requirements and limitations of the State's new constitutional amendment. That clear understanding will not be achieved until the conclusion of the judicial process. This Court has no delusion that its pronouncement will be the last word on the subject. History has confirmed that the district courts, in cases of this importance, are mere way stations on the judicial road to a final resolution by courts beyond. Nonetheless, the case must pass through this stage—and promptly—before the goal of finality can be realized.

Allowing additional parties into the lawsuit at this stage of the proceedings will inhibit, not promote, a prompt resolution by this Court. Additional parties no doubt could seek to file more claims, amend pleadings even further, and inject issues that may not lead directly to a resolution of the issues circumscribed by the present pleadings. The rules of civil procedure, including Rule 24(b), must be "construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. After balancing the relevant factors, the Court determines that allowing discretionary intervention will not advance that objective.

III.

The Court has found that proposed intervenor Eric Russell has established a right to intervene. The Court

is not persuaded that the remaining proposed intervenors ought to intervene in the present action. One of the proposed intervenors has filed a motion to dismiss, which will be stricken because it was not filed by a proper party to the case.

Accordingly, it is **ORDERED** that the motions to expedite the motion to intervene by Eric Russell and Toward a Fair Michigan [dkt #43], the American Civil Rights Foundation and Michigan Civil Rights Initiative Committee [dkt #41], and the City of Lansing [dkt #38] are **GRANTED**.

It is further **ORDERED** that the motion to intervene by Eric Russell [dkt #27] is **GRANTED**.

It is further **ORDERED** that the motion to intervene by Toward a Fair Michigan [dkt #27] is **DENIED**.

It is further **ORDERED** that the motion to intervene by American Civil Rights Foundation and Michigan Civil Rights Initiative Committee [dkt # 16] is **DENIED**.

It is further **ORDERED** that the motion to intervene by City of Lansing [dkt # 31] is **DENIED**.

It is further **ORDERED** that the motion to dismiss by American Civil Rights Foundation and Michigan Civil Rights Initiative Committee [dkt # 21] is **STRICKEN**.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: December 27, 2006

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first class U.S. mail on December 27, 2006.

s/Felicia M. Moses
FELICIA M. MOSES

Appendix C–1

FILED DEC 17 2007 LEONARD GREEN, Clerk

Nos. 06-2653/2656

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

COALITION TO DEFEND AFFIRMATIVE ACTION, ET AL.,	)	
Plaintiffs-Appellees,	)	**ORDER**
v.	)	
JENNIFER GRANHOLM, ET AL.,	)	
Defendants-Appellees,	)	
MICHIGAN CIVIL RIGHTS INITIATIVE COMMITTEE, ET AL.,	)	
Proposed Intervenors-Appellants.	)	

BEFORE: KENNEDY, MARTIN, and COLE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/Leonard Green

Leonard Green, Clerk

Westlaw

Federal Rules of Civil Procedure Rule 24

United States Code Annotated Currentness

Federal Rules of Civil Procedure for the United States District Courts (Refs & Annos)

Title IV. Parties

Rule 24. Intervention

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) Permissive Intervention.

(1) ***In General.*** On timely motion, the court may permit anyone to intervene who:

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) ***By a Government Officer or Agency.*** On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) ***Delay or Prejudice.*** In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

CREDIT(S)

(Amended December 27, 1946, effective March 19, 1948; December 29, 1948, effective October 20, 1949; January 21, 1963, effective July 1, 1963; February 28, 1966, effective July 1, 1966; March 2, 1987, effective August 1, 1987; April 30, 1991, effective December 1, 1991; April 12, 2006, effective December 1, 2006; April 30, 2007, effective December 1, 2007.)

Amendments received to 12-01-07

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Federal Rules of Civil Procedure Rule 24

UNITED STATES CODE ANNOTATED

FEDERAL RULES OF CIVIL PROCEDURE **FOR THE UNITED STATES DISTRICT COURTS**

IV. PARTIES

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconstitutional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency

upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene.

Amendments received to 02-08-07

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M.C.L.A. Const. Art. 1, § 26

MICHIGAN COMPILED LAWS ANNOTATED CURRENTNESS

MICHIGAN CONSTITUTION OF 1963

CHAPTER 1. **THE FUNDAMENTAL LAW CONSTITUTION OF THE STATE OF MICHIGAN 1963**

ARTICLE I. DECLARATION OF RIGHTS

§ 26. Affirmative action

Sec. 26. (1) The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting.

(2) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(3) For the purposes of this section "state" includes, but is not necessarily limited to, the state itself, any city, county, any public college, university, or community college, school district, or other political subdivision or governmental instrumentality of or within the State of Michigan not included in sub-section 1.

(4) This section does not prohibit action that must be taken to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state.

(5) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(6) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of Michigan's anti-discrimination law.

(7) This section shall be self-executing. If any part or parts of this section are found to be in conflict with the United States Constitution or federal law, the section shall be implemented to the maximum extent that the United States Constitution and federal law permit. Any provision held invalid shall be severable from the remaining portions of this section.

(8) This section applies only to action taken after the effective date of this section.

(9) This section does not invalidate any court order or consent decree that is in force as of the effective date of this section.

<Effective January 1, 1964>

Current with amendments received through 1/31/08

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